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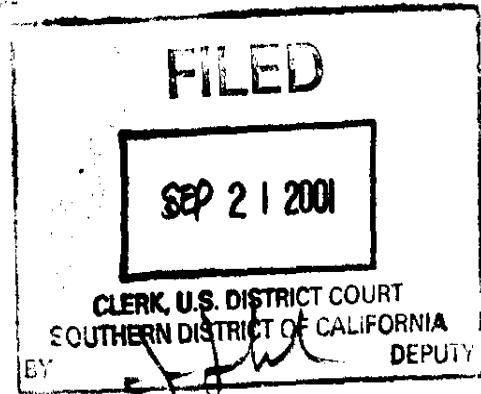
3:00-CV-02054 GULF UNDERWRITERS V. BUILDERS FINANCIAL

59

AMDCNT.

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Attorneys for Defendants and Counter-Claimants
Builders Financial Group, Inc.; Bruce A. Olster; and
Madeline Olster; Defendant Joseph E. Telese; and
Counter-Claimants Benjamin A. Alev; Draper Plaza,
LLC, AMKA Holdings, LLC; BAM Investment, Inc.,
ABA, LLC; Benjamin A. Alev, Trustee of the KTB
Irrevocable Trust; ALKA Enterprises, LLC; Steele
Canyon 2, LLC; Steele Canyon 14, LLC; Steele
Canyon 33, LLC; Dove Hollow, LLC; 2903 Wishbone
Way, LLC; and P.P. B., LLC



**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

GULF UNDERWRITERS INSURANCE
COMPANY, a Missouri corporation,

Plaintiff,

v.

BUILDERS FINANCIAL GROUP, a
Delaware corporation; BRUCE A. OLSTER,
an individual; MADELINE S. OLSTER, an
individual; JOSEPH E. TELESE, an
individual; and DOES 1 through 20
inclusive,

Defendants.

BUILDERS FINANCIAL GROUP, INC., a
Delaware corporation; BRUCE A. OLSTER,
an individual; MADELINE S. OLSTER, an
individual; BENJAMIN A. ALEV, an
individual; DRAPER PLAZA, LLC, a Nevada
limited liability company; AMKA
HOLDINGS, LLC, a Nevada limited liability
company; BAM INVESTMENT, INC., an
Arizona corporation; ABA, LLC, a Nevada
limited liability company; BENJAMIN A.
ALEV, TRUSTEE OF THE KTB
IRREVOCABLE TRUST; ALKA ENTERPRISES,
LLC, an Arizona limited liability company;

Case No.: 00 CV 2054 IEG (LAB)

SECOND AMENDED COUNTER-CLAIM

[Plaintiffs Demand Jury Trial]

1 STEELE CANYON 2, LLC, an Arizona
2 limited liability company; STEELE CANYON
3 14, LLC, an Arizona limited liability
4 company; STEELE CANYON 33, LLC, an
5 Arizona limited liability company; DOVE
6 HOLLOW, LLC, an Arizona limited liability
7 company; 2903 WISHBONE WAY, LLC, an
8 Arizona limited liability company; and
9 P.P.B., LLC, an Arizona limited liability
10 company,

6 Counter-Claimants,

7 v.

8 GULF UNDERWRITERS INSURANCE
9 COMPANY, a Missouri corporation; and
10 ROES 1 through 200, inclusive,

10 Counter-Defendant.

11 Counter-Claimants BUILDERS FINANCIAL GROUP, INC., BRUCE A. OLSTER,
12 MADELINE S. OLSTER, BENJAMIN A. ALEV, DRAPER PLAZA, LLC, AMKA HOLDINGS,
13 LLC, ABA, LLC, BENJAMIN A. ALEV, TRUSTEE OF THE KTB IRREVOCABLE TRUST, BAM
14 INVESTMENT, INC., ALKA ENTERPRISES, LLC, STEELE CANYON 2, LLC, STEELE
15 CANYON 14, LLC, STEELE CANYON 33, LLC, DOVE HOLLOW, LLC, 2903 WISHBONE
16 WAY, LLC and P.P.B., LLC allege as follows:

17 I.

18 JURISDICTION

- 19 1. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1367(a).

20 II.

21 VENUE

- 22 2. Venue is proper in this judicial district under 28 U.S.C. § 1391(a).

23 III.

24 THE PARTIES

- 25 3. Counter-Claimant BUILDERS FINANCIAL GROUP, INCORPORATED was
26 and is, at all times material to this action, a Delaware corporation with its principal place
27 of business in Florida, and is the named insured under a policy of insurance issued by
28

1 Counter-Defendant Gulf Underwriters Insurance Company, as more particularly described
2 below.

3 4. Counter-Claimant BRUCE A. OLSTER was and is, at all times material to this
4 action, an individual residing in the State of Florida, and an officer of Builders Financial
5 Group.

6 5. Counter-Claimant MADELINE S. OLSTER was and is, at all times material to
7 this action, an individual residing in the State of Florida, and an owner, officer and
8 director of Builders Financial Group.

9 6. Counter-Claimant BENJAMIN A. ALEV ("Alev") is an individual residing in
10 the State of Arizona. Alev is the trustee of Counter-Claimant the KTB IRREVOCABLE
11 TRUST. The KTB IRREVOCABLE TRUST ("KTB") is the sole member of Counter-Claimant
12 ABA, LLC, a limited liability company. ABA, LLC ("ABA") is a limited liability company
13 organized and existing under the laws of the State of Nevada, having its principal place of
14 business in Carson City, Nevada and is authorized to do business in California.

15 7. Counter-Claimant P.P.B., LLC ("PPB") is a limited liability company
16 organized and existing under the laws of the State of Arizona, having its principal place of
17 business in Tucson, Arizona.

18 8. Counter-Claimant DRAPER PLAZA, LLC ("Draper") is a limited liability
19 company organized and existing under the laws of the State of Nevada, having its principal
20 place of business in Carson City, Nevada and is authorized to do business in California.

21 9. Counter-Claimant BAM INVESTMENT, INC. ("BAM") is a corporation
22 organized and existing under the laws of the State of Arizona, having its principal place of
23 business in Tucson, Arizona and is authorized to do business in California.

24 10. Counter-Claimant ALKA ENTERPRISES, LLC ("ALKA") is a limited liability
25 company organized and existing under the laws of the State of Arizona, having its principal
26 place of business in Tucson, Arizona and is authorized to do business in California.

27 11. Counter-Claimant AMKA HOLDINGS, LLC ("AMKA") is a limited liability
28 company organized and existing under the laws of the State of Nevada.

12. Counter-Claimant 2903 WISHBONE WAY, LLC ("Wishbone") is a limited liability company organized and existing under the laws of the State of Arizona, having its principal place of business in Tucson, Arizona and is authorized to do business in California.

13. Counter-Claimant STEELE CANYON 2, LLC ("Steele 2") is a limited liability company organized and existing under the laws of the State of Arizona, having its principal place of business in Tucson, Arizona and is authorized to do business in California.

14. Counter-Claimant STEELE CANYON 14, LLC ("Steele 14") is a limited liability company organized and existing under the laws of the State of Arizona, having its principal place of business in Tucson, Arizona and is authorized to do business in California.

15. Counter-Claimant STEELE CANYON 33, LLC ("Steele 33") is a limited liability company organized and existing under the laws of the State of Arizona, having its principal place of business in Tucson, Arizona and is authorized to do business in California.

16. Counter-Claimant DOVE HOLLOW, LLC ("Dove") is a limited liability company organized and existing under the laws of the State of Arizona, having its principal place of business in Tucson, Arizona and is authorized to do business in California. Alev, Draper, BAM, ABA, ALKA, AMKA, Wishbone, Steele 2, Steele 14, Steele 33, PPB, KTB and Dove are collectively referred to herein as "Alev Counter-Claimants."

17. Based upon information and belief, Counter-Defendant Gulf Underwriters Insurance Company ("Gulf") was and is, at all times material to this action, a Missouri corporation with its principal place of business in New York, and is and has been conducting business in California.

IV.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

18. Builders Financial Group is engaged in the marketing, origination, processing and servicing of construction loans to developers of single family homes. Builders Financial Group acted by and through its officers, including Bruce Olster and Madeline Olster.

1 **A. The Insurance Policy**

2 19. At all times relevant hereto, Builders Financial Group, Bruce Olster and
3 Madeline Olster were insured by a Specialty Errors and Omissions Liability Insurance
4 Policy, number GU0406235 (the "Policy"), issued by Gulf. Builders Financial Group is
5 the named insured, and Bruce Olster and Madeline Olster are insured by virtue of their
6 status as officers and/or directors of Builders Financial Group.

7 20. The Policy provides coverage on a claims-made basis, and was in effect for
8 the period of September 29, 1998 to September 29, 1999. A copy of the Policy is
9 attached as Exhibit "B" to Gulf's Complaint and is incorporated herein by reference.

10 21. The Policy provides coverage for wrongful acts as defined therein. The
11 insuring agreement provides:

12 **We will pay on Your behalf those sums in excess of the Deductible and**
13 **within the applicable Limit of Insurance . . . that You become legally**
14 **obligated to pay as Damages or Claims Expenses because of Claims as a**
 result of a Wrongful Act in performing Insured Services for others.

15 22. The term "wrongful act" is defined in relevant part as "a negligent act, error
16 or omission." The term "insured services" means "mortgage banking operations
17 consisting of loan origination, processing, closing, accounting, warehousing, marketing
18 and servicing."

19 23. Builders Financial Group paid all premiums due under the Policy and
20 performed all obligations and conditions required on its part to keep the Policy in full
21 force and effect.

22 **B. The Underlying Lawsuits**

23 24. In the summer of 1999, two separate lawsuits were filed against Builders
24 Financial Group, Bruce Olster and Madeline Olster (hereinafter collectively referred to as
25 "BFG").

26 25. On July 23, 1999, customers of BFG filed a Complaint against BFG in an
27 action captioned Benjamin A. Alev, et al. v. Apollo Funding Corp., et al. in the United
28 States District Court for the Southern District of California, Case No. 99CV1527B(LAB)

1 (the "Federal Action"). This Complaint was amended on two occasions: November 18,
2 1999, and May 16, 2000. A copy of the Second Amended Complaint in the Federal
3 Action is attached hereto as Exhibit "A."

4 26. Thereafter in a different action, captioned Apollo Funding Corp. v.
5 Benjamin A. Alev, et al. in the San Diego Superior Court, Case No. 732437 (the "State
6 Action"), Apollo Funding Corporation filed a Complaint against customers of BFG. On
7 August 18, 1999, those customers filed a Cross-Complaint against BFG in that same
8 action. The Cross-Complaint was amended on two occasions: November 1, 1999, and
9 May 16, 2000. A copy of the Second Amended Cross-Complaint is attached hereto as
10 Exhibit "B." Alev, ABA, KTB, PPB, Draper, BAM, ALKA, Wishbone, Steele 2, Steele 14,
11 Steele 33, and Dove were the Cross-Complainants in the State Action.

12 27. The State and the Federal Actions arise out of the same transactions and
13 contain virtually identical allegations.

14 28. The State and Federal Actions allege that between 1996 and 1998, BFG
15 made a series of loans to Benjamin Alev and his companies, for construction projects in
16 Arizona and California. The complaints allege, among other things, that in connection
17 with these loans, BFG made negligent misrepresentations concerning the terms of the
18 loans, extensions of the loans, buy back provisions, and BFG's license to act as a
19 mortgage broker in Arizona.

20 29. Before the commencement of trial, Cross-Complainants in the State Action
21 sought and were granted leave to amend their Cross-Complaint to conform to proof to
22 allege against BFG a cause of action for negligence arising out of BFG's conduct in
23 servicing Cross-Complainants' loans.

24 30. The allegations made in the State and Federal Actions constitute allegations
25 of "wrongful acts" as defined by the Gulf insurance policy.

26 31. BFG tendered defense and indemnity of the State and Federal Actions to
27 Gulf.
28

1 32. After a delay of more than 6 months, Gulf accepted defense of the State and
2 Federal Actions under a reservation of rights, and agreed to pay defense costs incurred by
3 BFG's independent counsel. To date, Gulf has failed to pay any defense costs.

4 33. On the same day that it agreed to defend BFG under the Policy, Gulf issued
5 a Notice of Rescission of the Policy. The purported rescission is based on alleged
6 material misrepresentations in BFG's application for insurance. BFG denies that it made
7 any material misrepresentations on its application.

8 34. Only one day after accepting defense of the State and Federal Actions, Gulf
9 filed the instant lawsuit seeking rescission, return of benefits received under the Policy,
10 and a declaration that it has no duty to defend or indemnify BFG in the State and Federal
11 Actions.

12 35. Prior to commencement of trial, Cross-Complainants, including the Alev
13 Counter-Claimants, made an offer to Gulf within Policy limits, in complete settlement of
14 their claims against BFG. Gulf rejected the offer and made Cross-Complainants a counter-
15 offer in complete settlement of their claims against BFG, but that counter-offer was
16 inadequate.

17 36. On or about March 7, 2001, BFG in writing and for a valuable
18 consideration assigned to the Alev Counter-Claimants all BFG's assignable rights, title and
19 interest in and to the causes of action herein alleged by the Alev Counter-Claimants
20 against Gulf. A true and correct copy of the assignment is attached hereto as Exhibit "C."

21 37. On or about March 13, 2001, the State Action proceeded to trial on Cross-
22 Complainants' negligence claim. At the conclusion of the trial, the Court in the State
23 Action found in favor of Cross-Complainants and against BFG and, further, awarded Cross-
24 Complainants damages in the amount of \$20,241,012.00. Judgment in the State Action
25 was entered on May 1, 2001. A copy of the judgment is attached hereto as Exhibit "D."
26
27
28

FIRST CLAIM FOR RELIEF

(Breach of Contract)

38. Counter-Claimants incorporate by reference paragraphs 1 through 37 above as though fully set forth herein.

39. The Policy provides coverage for negligent acts, errors or omissions committed by BFG, as alleged above.

40. The Second Amended Cross-Complaint in the State Action and the Second Amended Complaint in the Federal Action both assert damage arising out of BFG's alleged negligent misrepresentations in the performance of BFG's duties. Further, as alleged above, Cross-Complainants in the State Action sought and were granted leave to amend their Cross-Complaint to conform to proof to allege against BFG a cause of action for negligence arising out of BFG's conduct in servicing Cross-Complainants' loans. These allegations constitute "wrongful acts" within the meaning of the Policy, and trigger Gulf's duty to defend and indemnify BFG in both the State and Federal Actions.

41. To date, Gulf has failed or refused to pay any defense costs incurred in defending the State and Federal Actions.

42. Gulf has breached its contractual duty under the Policy by failing to provide benefits due thereunder, including but not limited to, failing to pay defense costs incurred by BFG in the State and Federal Actions, failing to settle the State and Federal Actions and failing to pay any portion of the judgment against BFG in the State Action.

43. BFG has performed all obligations, covenants and conditions of the Policy required of it, except those obligations, covenants and conditions for which its performance was excused.

44. As a legal result of Gulf's breach of contract as herein alleged, Counter-Claimants have suffered damages in an amount in excess of the minimum jurisdictional limits of this court, to be proven at the time of trial.

SECOND CLAIM FOR RELIEF

(Breach of The Covenant of Good Faith and Fair Dealing)

45. Counter-Claimants incorporate by reference paragraphs 1 through 34 above as though fully set forth herein.

46. In response to BFG's tender of the State and Federal Actions, among other duties, Gulf had a duty to: (a) conduct a prompt investigation of the claim; (b) affirm or deny coverage within a reasonable time; (c) promptly pay benefits due under the Policy; (d) attempt in good faith to effectuate a prompt, fair and equitable settlement of the claims; (e) settle claims promptly under one portion of the Policy, without attempting to influence settlement under other portions of the Policy; (f) respond to all communications from BFG promptly; (g) accept reasonable settlement offers within Policy limits where there was a substantial likelihood of a recovery in excess of Policy limits; and (h) engage in or refrain from engaging in additional acts to be proven at the time of trial.

47. After BFG submitted its claim for benefits under the Policy with respect to the State and Federal Actions, Gulf breached its duty of good faith and fair dealing owed in many respects, including but not limited to, the following:

- a. Willfully and in bad faith failing to promptly investigate coverage for these claims;
- b. Willfully and in bad faith failing to affirm or deny coverage in a timely manner. Specifically, BFG tendered defense and indemnity of the State Action to Gulf on March 29, 2000, and tendered defense and indemnity of the Federal Action to Gulf at that same time or, in any event, no later than April 5, 2000. More than six months passed without any acceptance or denial of coverage from Gulf. It was not until October 12, 2000, that Gulf finally informed BFG of its coverage determination, and accepted coverage under a reservation of rights;

- 1 c. Willfully and in bad faith failing to pay benefits due under the Policy,
2 despite the fact that Gulf accepted the defense of those actions under a
3 reservation of rights, and expressly agreed to pay for defense costs;
- 4 d. Willfully and in bad faith failing to effectuate a prompt, fair and equitable
5 settlement of the claims;
- 6 e. Willfully and in bad faith failing to settle claims promptly under one portion
7 of the insurance policy coverage in order to influence settlements under
8 other portions of the insurance policy coverage. Specifically, Gulf
9 conditioned settlement of the State and Federal claims on BFG's agreement
10 to rescind the policy;
- 11 f. Willfully and in bad faith failing to promptly respond to all communications
12 from BFG;
- 13 g. Upon information and belief, threatening BFG and BFG's prior counsel of
14 record with Rule 11 sanctions merely for the filing of BFG's original
15 Counter-Claim;
- 16 h. Willfully and in bad faith failing to settle the State and Federal Actions by
17 accepting Cross-Complainants' settlement offer within Policy limits in the
18 State Action;
- 19 i. Willfully and in bad faith engaging in other wrongful and illegal acts and
20 omissions to be proven at the time of trial. For example, throughout the
21 entire six months between BFG's tender and Gulf's coverage decision, Gulf
22 lead BFG to believe that it would accept coverage. Yet on the very same
23 day that Gulf finally accepted coverage under a reservation of rights, it also
24 sent a Notice of Rescission of the policy; and,
- 25 j. Willfully and in bad faith delaying, refusing and failing to pay the judgment
26 rendered against BFG.
- 27
- 28

1 48. Counter-Claimants are informed and believe and thereon allege that the
2 conduct of Gulf violates statutory duties under governing state law, as well as the
3 covenant of good faith and fair dealing implied in every insurance contract.

4 49. BFG has incurred attorney and expert fees and costs in defending itself
5 against the State and Federal Actions.

6 50. As a proximate result of Gulf's breaches of the implied covenant of good
7 faith and fair dealing, and violations of statutory duties as set forth above, Counter-
8 Claimants have suffered damages in an amount in excess of the minimum jurisdictional
9 limits of this court and to be proven at the time of trial.

10 51. As a further proximate result of Gulf's breaches of the implied covenant of
11 good faith and fair dealing, and violations of statutory duties, BFG been forced to retain
12 counsel of record and has incurred attorney fees to recover the benefits due under the
13 Policy.

14 52. Counter-Claimants are informed and believe and thereon allege that the
15 misconduct of Gulf was done with a conscious disregard of BFG's rights, and with the
16 intent to vex, injure or annoy BFG, such as to constitute oppression, fraud, malice, and
17 despicable conduct under California Civil Code section 3294, entitling Counter-Claimants
18 to punitive damages in an amount appropriate to punish and set an example of Gulf.

19 **THIRD CLAIM FOR RELIEF**

20 **(Breach of Contract, Refusal to Pay Judgment - Insurance Code Section 11580)**

21 53. Counter-Claimants incorporate by reference paragraphs 1 through 42 above
22 as though fully set forth herein.

23 54. The Policy, which is incorporated herein by this reference, provides: "A
24 person or organization may sue Us to recover on 'an agreed settlement' or on a final
25 judgment against You obtained after an actual trial; but We will not be liable for Damages
26 and Claim Expenses that are not payable under the provisions of the insurance or that are
27 in excess of the applicable Limit of Insurance."
28

1 55. After entry of the judgment against BFG, Gulf failed and refused to pay the
2 judgment recovered by the Alev Counter-Claimants and continue to fail and refuse to pay
3 the judgment or any portion of it, and no portion of the judgment has been paid by
4 anyone else.

5 56. As a legal result of Gulf's breach as herein alleged, Counter-Claimants have
6 suffered damages in an amount in excess of the minimum jurisdictional limits of this
7 court, to be proven at the time of trial.

8 WHEREFORE, Counter-Claimants pray for a judgment against Counter-Defendant
9 as follows:

10 **For the First Claim For Relief:**

- 11 1. For damages according to proof at the time of trial;
- 12 2. For pre-judgment interest at the legal rate;
- 13 3. For costs of suit herein incurred; and
- 14 4. For such other and further relief as the Court may deem just and proper.

15 **For the Second Claim For Relief:**

- 16 1. For damages according to proof at the time of trial;
- 17 2. For attorney fees pursuant to Brandt v. Superior Court (1985) 37 Cal.3d 813;
- 18 3. For punitive and exemplary damages, in an amount to be proven at trial;
- 19 4. For pre-judgment interest at the legal rate;
- 20 5. For costs of suit incurred herein; and
- 21 6. For such other and further relief as the court deems just and proper.

22 **For the Third Claim For Relief:**

- 23 1. For damages according to proof at the time of trial;
- 24 2. For pre-judgment interest at the legal rate;
- 25
- 26
- 27
- 28

3. For costs of suit herein incurred; and

4. For such other and further relief as the Court may deem just and proper.

DATED: September __, 2001 SOLOMON WARD SEIDENWURM & SMITH, LLP

By _____

RICHARD E. MCCARTHY

WILLIAM MCCURINE, JR.

DARCI L. DUBREUIL

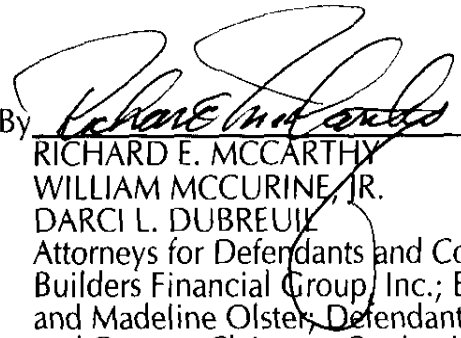
Attorneys for Defendants and Counter-Claimants
Builders Financial Group, Inc.; Bruce A. Olster;
and Madeline Olster; Defendant Joseph E. Telese;
and Counter-Claimants Benjamin A. Alev; Draper
Plaza, LLC; AMKA Holdings, LLC; BAM
Investment, Inc.; ABA, LLC; Benjamin A. Alev,
Trustee of the KTB Irrevocable Trust; ALKA
Enterprises, LLC; Steele Canyon 2, LLC; Steele
Canyon 14, LLC; Steele Canyon 33, LLC; Dove
Hollow, LLC; 2903 Wishbone Way, LLC; and
P.P.B., LLC

DEMAND FOR JURY TRIAL

Counter-Claimants hereby demand a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

DATED: September 10, 2001 SOLOMON WARD SEIDENWURM & SMITH, LLP

By


RICHARD E. MCCARTHY
WILLIAM MCCURINE, JR.
DARCI L. DUBREUIL
Attorneys for Defendants and Counter-Claimants
Builders Financial Group, Inc.; Bruce A. Olster;
and Madeline Olster; Defendant Joseph E. Telese;
and Counter-Claimants Benjamin A. Alev; Draper
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9 Attorneys for Defendants and Counter-Claimants
10 Builders Financial Group, Bruce A. Olster and
11 Madeline Olster, Defendant Joseph E. Telese, and
12 Counter-Claimants AMKA Holdings, LLC and ABA,
13 LLC

14
15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
17

18 GULF UNDERWRITERS INSURANCE
19 COMPANY, a Missouri corporation,

20 Plaintiff,

21 v.

22 BUILDERS FINANCIAL GROUP, a
23 Delaware corporation; BRUCE A. OLSTER,
24 an individual; MADELINE S. OLSTER, an
25 individual; JOSEPH E. TELESE, an
26 individual; and DOES 1 through 20
27 inclusive,

28 Defendants.

BUILDERS FINANCIAL GROUP, a
Delaware corporation; BRUCE A. OLSTER,
an individual; MADELINE S. OLSTER, an
individual; AMKA HOLDINGS, LLC, a
Nevada limited liability company; and
ABA, LLC, a Nevada limited liability
company,

Counter-Claimants,

v.

GULF UNDERWRITERS INSURANCE
COMPANY, a Missouri corporation,

Counter-Defendant.

Case No.: 00 CV 2054 IEG (LAB)

FIRST AMENDED COUNTER-CLAIM

[Plaintiffs Demand Jury]

1 Counter-Claimants BUILDERS FINANCIAL GROUP, BRUCE A. OLSTER,
2 MADELINE S. OLSTER, AMKA HOLDINGS, LLC and ABA, LLC allege as follows:

3 I.

4 JURISDICTION

5 1. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1367(a).

6 II.

7 VENUE

8 2. Venue is proper in this judicial district under 28 U.S.C. §1391(a).

9 III.

10 THE PARTIES

11 3. Counter-Claimant Builders Financial Group was and is, at all times material
12 to this action, a Delaware corporation with its principal place of business in Florida, and
13 is the named insured under a policy of insurance issued by Counter-Defendant Gulf
14 Underwriters Insurance Company, as more particularly described below.

15 4. Counter-Claimant Bruce A. Olster was and is, at all times material to this
16 action, an individual residing in the State of Florida, and an officer of Builders Financial
17 Group.

18 5. Counter-Claimant Madeline S. Olster was and is, at all times material to this
19 action, an individual residing in the State of Florida, and an owner, officer and director of
20 Builders Financial Group.

21 6. Counter-Claimants AMKA Holdings, LLC and ABA, LLC (hereinafter
22 sometimes collectively referred to as the "Alev Counter-Claimants") are and were, at all
23 times material to this action, Nevada limited liability companies.

24 7. Based upon information and belief, Counter-Defendant Gulf Underwriters
25 Insurance Company ("Gulf") was and is, at all times material to this action, a Missouri
26 corporation with its principal place of business in New York, and is and has been
27 conducting business in California.
28

IV.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

8. Builders Financial Group is engaged in the marketing, origination, processing and servicing of construction loans to developers of single family homes. Builders Financial Group acted by and through its officers, including Bruce Olster and Madeline Olster.

A. The Insurance Policy

9. At all times relevant hereto, Builders Financial Group, Bruce Olster and Madeline Olster were insured by a Specialty Errors and Omissions Liability Insurance Policy, number GU0406235 (the "Policy"), issued by Gulf. Builders Financial Group is the named insured, and Bruce Olster and Madeline Olster are insured by virtue of their status as officers and/or directors of Builders Financial Group.

10. The Policy provides coverage on a claims-made basis, and was in effect for the period of September 29, 1998 to September 29, 1999. A copy of the Policy is attached as Exhibit "B" to Gulf's Complaint and is incorporated herein by reference.

11. The Policy provides coverage for wrongful acts as defined therein. The insuring agreement provides:

We will pay on Your behalf those sums in excess of the Deductible and within the applicable Limit of Insurance . . . that You become legally obligated to pay as Damages or Claims Expenses because of Claims as a result of a Wrongful Act in performing Insured Services for others.

12. The term "wrongful act" is defined in relevant part as "a negligent act, error or omission." The term "insured services" means "mortgage banking operations consisting of loan origination, processing, closing, accounting, warehousing, marketing and servicing."

13. Builders Financial Group paid all premiums due under the Policy and performed all obligations and conditions required on its part to keep the Policy in full force and effect.

////

1 **B. The Underlying Lawsuits**

2 14. In the summer of 1999, two separate lawsuits were filed against Builders
3 Financial Group, Bruce Olster and Madeline Olster (hereinafter collectively referred to as
4 "BFG").

5 15. On July 23, 1999, customers of BFG filed a Complaint against BFG in an
6 action captioned Benjamin A. Alev, et al. v. Apollo Funding Corp., et al. in the United
7 States District Court for the Southern District of California, Case No. 99CV1527B(LAB)
8 (the "Federal Action"). This Complaint was amended on two occasions: November 18,
9 1999, and May 16, 2000. A copy of the Second Amended Complaint in the Federal
10 Action is attached hereto as Exhibit "A."

11 16. Thereafter in a different action, captioned Apollo Funding Corp. v.
12 Benjamin A. Alev, et al. in the San Diego Superior Court, Case No. 732437 (the "State
13 Action"), Apollo Funding Corporation filed a Complaint against customers of BFG. On
14 August 18, 1999, those customers filed a Cross-Complaint against BFG in that same
15 action. The Cross-Complaint was amended on two occasions: November 1, 1999, and
16 May 16, 2000. A copy of the Second Amended Cross-Complaint is attached hereto as
17 Exhibit "B."

18 17. The State and the Federal Actions arise out of the same transactions and
19 contain virtually identical allegations.

20 18. The State and Federal Actions allege that between 1996 and 1998, BFG
21 made a series of loans to Benjamin Alev and his companies, for construction projects in
22 Arizona and California. The complaints allege, among other things, that in connection
23 with these loans, BFG made negligent misrepresentations concerning the terms of the
24 loans, extensions of the loans, buy back provisions, and BFG's license to act as a
25 mortgage broker in Arizona.

26 ////

27 ////

1 19. Before the commencement of trial, cross-complainants in the State Action
2 sought and were granted leave to amend their Cross-Complaint to conform to proof to
3 allege against BFG a cause of action for negligence arising out of BFG's conduct in
4 servicing cross-complainants' loans.

5 20. The allegations made in the State and Federal Actions constitute allegations
6 of "wrongful acts" as defined by the Gulf insurance policy.

7 21. BFG tendered defense and indemnity of the State and Federal Actions to
8 Gulf.

9 22. After a delay of more than 6 months, Gulf accepted defense of the State and
10 Federal Actions under a reservation of rights, and agreed to pay defense costs incurred by
11 BFG's independent counsel. To date, Gulf has failed to pay any defense costs.

12 23. On the same day that it agreed to defend BFG under the Policy, Gulf issued
13 a Notice of Rescission of the Policy. The purported rescission is based on alleged
14 material misrepresentations in BFG's application for insurance. BFG denies that it made
15 any material misrepresentations on its application.

16 24. Only one day after accepting defense of the State and Federal Actions, Gulf
17 filed the instant lawsuit seeking rescission, return of benefits received under the Policy,
18 and a declaration that it has no duty to defend or indemnify BFG in the State and Federal
19 Actions.

20 25. Prior to commencement of trial, cross-complainants, including the Alev
21 Counter-Claimants, made an offer to Gulf within Policy limits, in complete settlement of
22 their claims against BFG. Gulf rejected the offer and made cross-complainants a counter-
23 offer in complete settlement of their claims against BFG, but that counter-offer was
24 inadequate.

25 26. On or about March 7, 2001, BFG in writing and for a valuable
26 consideration assigned to the Alev Counter-Claimants all BFG's assignable rights, title and
27 interest in and to the causes of action herein alleged by the Alev Counter-Claimants
28 against Gulf. A true and correct copy of the assignment is attached hereto as Exhibit "C."

- 1 under a reservation of rights;
- 2 c. Willfully and in bad faith failing to pay benefits due under the Policy,
- 3 despite the fact that Gulf accepted the defense of those actions under a
- 4 reservation of rights, and expressly agreed to pay for defense costs;
- 5 d. Willfully and in bad faith failing to effectuate a prompt, fair and equitable
- 6 settlement of the claims;
- 7 e. Willfully and in bad faith failing to settle claims promptly under one portion
- 8 of the insurance policy coverage in order to influence settlements under
- 9 other portions of the insurance policy coverage. Specifically, Gulf
- 10 conditioned settlement of the State and Federal claims on BFG's agreement
- 11 to rescind the policy;
- 12 f. Willfully and in bad faith failing to promptly respond to all communications
- 13 from BFG;
- 14 g. Upon information and belief, threatening BFG and BFG's prior counsel of
- 15 record with Rule 11 sanctions merely for the filing of BFG's original
- 16 Counter-Claim;
- 17 h. Willfully and in bad faith failing to settle the State and Federal Actions by
- 18 accepting cross-complainants' settlement offer within Policy limits in the
- 19 State Action;
- 20 i. Willfully and in bad faith engaging in other wrongful and illegal acts and
- 21 omissions to be proven at the time of trial. For example, throughout the
- 22 entire six months between BFG's tender and Gulf's coverage decision, Gulf
- 23 lead BFG to believe that it would accept coverage. Yet on the very same
- 24 day that Gulf finally accepted coverage under a reservation of rights, it also
- 25 sent a Notice of Rescission of the policy; and,
- 26 j. Willfully and in bad faith delaying, refusing and failing to pay the judgment
- 27 rendered against BFG.

28 ////

1 38. Counter-Claimants are informed and believe and thereon allege that the
2 conduct of Gulf violates statutory duties under governing state law, as well as the
3 covenant of good faith and fair dealing implied in every insurance contract.

4 39. BFG has incurred attorney and expert fees and costs in defending itself
5 against the State and Federal Actions.

6 40. As a proximate result of Gulf's breaches of the implied covenant of good
7 faith and fair dealing, and violations of statutory duties as set forth above, Counter-
8 Claimants have suffered damages in an amount in excess of the minimum jurisdictional
9 limits of this court and to be proven at the time of trial.

10 41. As a further proximate result of Gulf's breaches of the implied covenant of
11 good faith and fair dealing, and violations of statutory duties, BFG been forced to retain
12 counsel of record and has incurred attorney fees to recover the benefits due under the
13 Policy.

14 42. Counter-Claimants are informed and believe and thereon allege that the
15 misconduct of Gulf was done with a conscious disregard of BFG's rights, and with the
16 intent to vex, injure or annoy BFG, such as to constitute oppression, fraud, malice, and
17 despicable conduct under California Civil Code section 3294, entitling Counter-Claimants
18 to punitive damages in an amount appropriate to punish and set an example of Gulf.

19 **THIRD CLAIM FOR RELIEF**

20 **(Breach of Contract, Refusal to Pay Judgment - Insurance Code §11580)**

21 43. Counter-Claimants incorporate by reference paragraphs 1 through 42 above
22 as though fully set forth herein.

23 44. The Policy, which is incorporated herein by this reference, provides: "A
24 person or organization may sue Us to recover on 'an agreed settlement' or on a final
25 judgment against You obtained after an actual trial; but We will not be liable for Damages
26 and Claim Expenses that are not payable under the provisions of the insurance or that are
27 in excess of the applicable Limit of Insurance."

28 /////

1 45. After entry of the judgment against BFG, Gulf failed and refused to pay the
2 judgment recovered by the Alev Counter-Claimants and continue to fail and refuse to pay
3 the judgment or any portion of it, and no portion of the judgment has been paid by
4 anyone else.

5 46. As a legal result of Gulf's breach as herein alleged, Counter-Claimants have
6 suffered damages in an amount in excess of the minimum jurisdictional limits of this
7 court, to be proven at the time of trial.

8 WHEREFORE, Counter-Claimants pray for a judgment against Counter-Defendant
9 as follows:

10 **For the First Claim For Relief:**

- 11 1. For damages according to proof at the time of trial;
12 2. For pre-judgment interest at the legal rate;
13 3. For costs of suit herein incurred; and
14 4. For such other and further relief as the Court may deem just and proper.

15 **For the Second Claim For Relief:**

- 16 1. For damages according to proof at the time of trial;
17 2. For attorney fees pursuant to Brandt v. Superior Court (1985) 37 Cal.3d 813;
18 3. For punitive and exemplary damages, in an amount to be proven at trial;
19 4. For pre-judgment interest at the legal rate;
20 5. For costs of suit incurred herein; and
21 6. For such other and further relief as the court deems just and proper.

22 ////

23 ////

For the Third Claim For Relief:

1. For damages according to proof at the time of trial;
2. For pre-judgment interest at the legal rate;
3. For costs of suit herein incurred; and
4. For such other and further relief as the Court may deem just and proper.

DATED: May __, 2001

SOLOMON WARD SEIDENWURM & SMITH, LLP

By

RICHARD E. MCCARTHY
WILLIAM MCCURINE, JR.
KARL A. SANDOVAL

Attorneys for Defendants and Counter-Claimants
Builders Financial Group, Bruce A. Olster,
Madeline Olster, Defendant Joseph E. Telese, and
Counter-Claimants AMKA Holdings, LLC and ABA,
LLC

DEMAND FOR JURY TRIAL

Counter-Claimants hereby demand a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

DATED: May __, 2001

SOLOMON WARD SEIDENWURM & SMITH, LLP

By

RICHARD E. MCCARTHY

WILLIAM MCCURINE, JR.

KARL A. SANDOVAL

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Builders Financial Group, Bruce A. Olster,
Madeline Olster, Defendant Joseph E. Telese, and
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9 Attorneys for Plaintiffs
10 Benjamin A. Alev, Draper Plaza, LLC, BAM
11 Investment, Inc., ABA, LLC, Benjamin A. Alev,
12 Trustee of the KTB Irrevocable Trust, ALKA
13 Enterprises, LLC, 2903 Wishbone Way, LLC, Steele
14 Canyon 2, LLC, Steele Canyon 14, LLC, Steele
15 Canyon 33, LLC, Dove Hollow, LLC, P.P.B., LLC

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BENJAMIN A. ALEV, an individual,
DRAPER PLAZA, LLC, a Nevada limited
liability company, BAM INVESTMENT,
INC., an Arizona corporation, ABA, LLC, a
Nevada limited liability company,
BENJAMIN A. ALEV, TRUSTEE OF THE
KTB IRREVOCABLE TRUST, ALKA
ENTERPRISES, LLC, an Arizona limited
liability company, 2903 WISHBONE
WAY, LLC, an Arizona limited liability
company, STEELE CANYON 2, LLC, an
Arizona limited liability company, STEELE
CANYON 14, LLC, an Arizona limited
liability company, STEELE CANYON 33,
LLC, an Arizona limited liability company,
DOVE HOLLOW, LLC, an Arizona limited
liability company, P.P.B., LLC, an Arizona
limited liability company,

Plaintiffs,

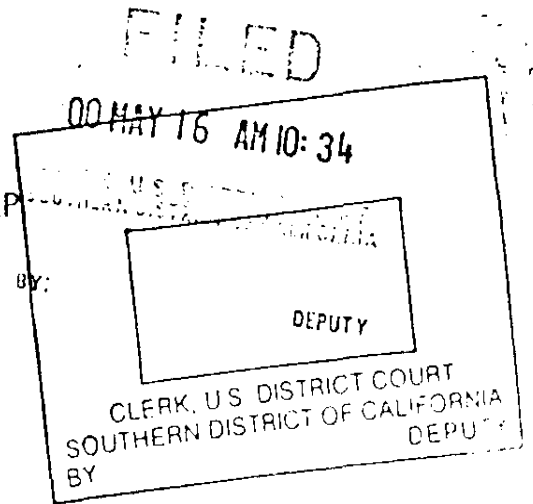
v.

APOLLO FUNDING CORP., a Delaware
corporation, BRUCE A. OLSTER, an
individual, APOLLO MORTGAGE &
FINANCIAL SERVICES, INC., a Florida
corporation, MADELINE OLSTER, an
individual, JOSEPH E. TELESE, an
individual, BUILDERS FINANCIAL

Case No.: 99 CV 1527B (LAB)

SECOND AMENDED COMPLAINT

[Plaintiffs Demand Jury]



COPY

1 GROUP INCORPORATED, a Delaware
2 corporation, NATIONAL FUND
3 CONTROL, LLC, a Colorado corporation,
4 THE JET GROUP CORP., a Delaware
5 corporation, INSOUTH BANK, a
6 Tennessee corporation, SOUTHERN
7 FINANCIAL, INC., a Tennessee
8 corporation,

9 Defendants.

10 Plaintiffs allege as follows:

11 I.

12 THE PARTIES

13 1. Plaintiff BENJAMIN A. ALEV ("Alev") is an individual residing in the State of
14 Arizona. Alev is the trustee of plaintiff the KTB Irrevocable Trust. The KTB Irrevocable
15 Trust ("KTB") is the sole member of plaintiff ABA, LLC, a limited liability company. ABA,
16 LLC ("ABA") is a limited liability company organized and existing under the laws of the
17 State of Nevada, having its principal place of business in Carson City, Nevada and is
18 authorized to do business in California.

19 2. Plaintiff DRAPER PLAZA, LLC ("Draper") is a limited liability company
20 organized and existing under the laws of the State of Nevada, having its principal place of
21 business in Carson City, Nevada, and is authorized to do business in California.

22 3. Plaintiff BAM INVESTMENT, INC. ("BAM") is a corporation organized and
23 existing under the laws of the State of Arizona, having its principal place of business in
24 Tucson, Arizona and is authorized to do business in California.

25 4. Plaintiff ALKA ENTERPRISES, LLC ("ALKA") is a limited liability company
26 organized and existing under the laws of the State of Arizona, having its principal place of
27 business in Tucson, Arizona and is authorized to do business in California.

28 5. Plaintiff 2903 WISHBONE WAY, LLC ("Wishbone") is a limited liability
company organized and existing under the laws of the State of Arizona, having its principal
place of business in Tucson, Arizona and is authorized to do business in California.

1 6. Plaintiff STEELE CANYON 2, LLC ("Steele 2") is a limited liability company
2 organized and existing under the laws of the State of Arizona, having its principal place of
3 business in Tucson, Arizona and is authorized to do business in California.

4 7. Plaintiff STEELE CANYON 14, LLC ("Steele 14") is a limited liability company
5 organized and existing under the laws of the State of Arizona, having its principal place of
6 business in Tucson, Arizona and is authorized to do business in California.

7 8. Plaintiff STEELE CANYON 33, LLC ("Steele 33") is a limited liability company
8 organized and existing under the laws of the State of Arizona, having its principal place of
9 business in Tucson, Arizona and is authorized to do business in California.

10 9. Plaintiff P.P.B., LLC ("PPB") is a limited liability company organized and existing
11 under the laws of the State of Arizona, having its principal place of business in Tucson,
12 Arizona.

13 10. Plaintiff DOVE HOLLOW, LLC ("Dove") is a limited liability company
14 organized and existing under the laws of the State of Arizona, having its principal place of
15 business in Tucson, Arizona and is authorized to do business in California. Alev, Draper,
16 BAM, ABA, ALKA, Wishbone, Steele 2, Steele 14, Steele 33, KTB, PPB and Dove are
17 collectively referred to herein as "Plaintiffs."

18 11. Plaintiffs are informed and believe, and on that basis allege, that at all times
19 material to this action, defendant BRUCE A. OLSTER ("Olster") is, and at all times relevant
20 was, a citizen of Florida, in Pinellas County, Florida.

21 12. Plaintiffs are informed and believe, and on that basis allege, that at all times
22 material to this action, defendant APOLLO FUNDING CORP. ("Apollo Funding") was and
23 is a corporation organized and existing under the laws of the State of Delaware, with its
24 principal place of business in the State of Florida.

25 13. Plaintiffs are informed and believe, and on that basis allege, that at all times
26 material to this action, defendant APOLLO MORTGAGE & FINANCIAL SERVICES, INC.
27 ("Apollo Mortgage") was a corporation organized and existing under the laws of the State of
28

1 Florida. Plaintiffs are informed and believe, and on that basis allege, that Apollo Mortgage
2 filed a voluntary dissolution in Florida in or about May, 1999.

3 14. Plaintiffs are informed and believe, and on that basis allege, that at all times
4 material to this action, defendant MADELINE OLSTER ("Mrs. Olster") is, and at all times
5 relevant was, a citizen of Florida, in Pinellas County, Florida. Mrs. Olster is Olster's wife,
6 and plaintiffs are informed and believe, and on that basis allege, that she acted as the
7 officer, director and/or agent of one or more of the defendants.

8 15. Plaintiffs are informed and believe, and on that basis allege, that at all times
9 material to this action, defendant JOSEPH E. TELESE ("Telese") is, and at all times relevant
10 was, a citizen of Florida, and held the title of president of defendant BUILDERS FINANCIAL
11 GROUP INCORPORATED.

12 16. Plaintiffs are informed and believe, and on that basis allege, that at all times
13 material to this action, defendant BUILDERS FINANCIAL GROUP INCORPORATED
14 ("Builders Financial") was and is a corporation organized and existing under the laws of the
15 State of Florida with its principal place of business in the State of Florida.

16 17. Plaintiffs are informed and believe, and on that basis allege, that at all times
17 material to this action, defendant NATIONAL FUND CONTROL, LLC was and is a limited
18 liability company organized and existing under the laws of the State of Colorado, with its
19 principal place of business in the State of Colorado.

20 18. Plaintiffs are informed and believe, and on that basis allege, that at all times
21 material to this action, defendant THE JET GROUP CORP. ("The Jet Group") was and is a
22 corporation organized and existing under the laws of the State of Delaware, with its
23 principal place of business in the State of Florida.

24 19. Plaintiffs are informed and believe, and on that basis allege, that at all times
25 material to this action, defendant INSOUTH BANK ("InSouth") was and is a corporation
26 organized and existing under the laws of the State of Tennessee, with its principal place of
27 business in the State of Tennessee.

1 Mortgage, and Apollo Funding – he would assist Alev in obtaining construction loans,
2 development loans, and other loan and funding options that would be of great benefit to
3 Alev's business. During the course of the relationship, Olster represented that he had a
4 pool of \$100,000,000 to \$150,000,000 of development financing at his disposal. Olster
5 further represented that Alev would be one of only five national developers who would
6 have access to this financing pool. In addition, Olster represented that the lenders he
7 represented, and the loan structure Olster proposed, provided a unique financing
8 arrangement through an Olster-related entity, The Jet Group. Under such financing
9 arrangement, Olster and his lenders, through The Jet Group, would guaranty purchase of
10 the subject projects at purchase prices based upon appraisals, thereby providing plaintiffs
11 the benefit of a standby or back-up purchase commitment (the "Standby Purchase
12 Commitments") which would guaranty purchase of the properties. For this Standby
13 Purchase Commitment, and in reliance on defendants' representations and promises,
14 plaintiffs paid significant advance fees equal to 2.5% of each loan amount to The Jet Group
15 for the issuance of its Standby Purchase Commitments to repurchase the properties at
16 appraised value if so desired by plaintiffs.

17 26. Olster and Alev developed a relationship based upon trust, and Alev began
18 relying exclusively upon Olster and his companies and related lenders to supply the critical
19 funding for Alev's development projects. As part of this relationship, Olster represented to
20 Alev that he was able to act as a mortgage broker to secure loans for Alev's projects in
21 Arizona and California and would assist Alev in developing properties in those states.

22 27. Since 1996, Olster and his affiliated lenders made and/or brokered over forty
23 (40) loans for Alev's projects. Olster and his companies were paid approximately
24 \$1,000,000 in fees on these loans.

25 28. The projects funded through these loans included projects developed in
26 Arizona, and several more in California. Loan commitments were brokered by Olster
27 through Apollo Mortgage. Olster provided Alev with loan commitments through Builders
28

1 Financial. Olster in turn provided Alev with funding through Apollo Funding. Plaintiffs
2 have since discovered that other additional undisclosed lenders, including InSouth and
3 Southern Financial, have been involved and that Apollo Funding secretly transferred certain
4 loans to these lenders. Such lenders acted in concert with certain of the defendants.

5 29. Through these various Olster entities, Alev was able to develop several projects,
6 and the loans were used to pay the critical construction and development costs necessary
7 for Alev's projects to succeed and return a profit.

8 30. One of Alev's projects in Arizona – Plaza Pueblo Bonito, LLC (hereafter
9 "P.P.B.") – involved fifteen lots under development. Olster brokered and provided separate
10 loans through his companies to develop each individual lot. By the end of 1998, it was
11 necessary for Alev to request an extension on the P.P.B. loans. Alev and Olster had agreed
12 from the inception that the lots could not be completely developed within the initial short-
13 term loan period, and it would be necessary to later extend the due dates for the loans. As
14 it developed, the project required certain design changes because of local city
15 requirements. These changes resulted in delays in completing the improvements. This in
16 turn necessitated increased funding to cover the delays, redesigns and improvements. Alev
17 informed Olster of these facts, and Olster directed Alev to take the necessary funds out of
18 certain finished item categories of the construction draw schedule. Olster promised that the
19 additional costs would be funded later.

20 31. Despite Olster's promises that the P.P.B. loans would be extended before they
21 came due on December 31, 1998, Olster attempted to coerce Alev into making drastic
22 concessions on Alev's other projects as a precondition to extending the P.P.B. loans. On or
23 about December 18, 1998, Olster's attorneys provided him with a draft agreement to
24 forward to Alev that would have required Alev to cross-collateralize all his various projects,
25 and provide them as additional security for the P.P.B. loans. In addition, the proposed
26 agreement went far beyond a loan modification, and included a release in favor of Olster
27 and his companies from any and all liabilities, including for fraud, misrepresentation and
28

1 breaches of fiduciary duty.

2 32. Despite receiving the draft agreement from his attorneys on or about December
3 19, 1999, Olster waited to forward it to Alev until late in the evening of December 30,
4 1998. Olster sent the proposal by facsimile to Alev along with instructions that the
5 agreement and related loan documents must be reviewed by Alev's attorney, signed and
6 returned no later than the next morning, December 31, 1998 – New Year's Eve. However,
7 Alev was out of town and did not even receive the proposed loan modification and release
8 until after the P.P.B. loans' due dates. When Alev did review the proposed loan
9 modifications and release, Alev refused to even consider agreeing to what he believed to
10 be coercive and unfair changes both to the P.P.B. loans, and to all the other loans for his
11 other projects unrelated to P.P.B.

12 33. In response to Alev's refusal to release Olster and Alev's refusal to cross-
13 collateralize his various projects, Olster, Apollo Funding, Apollo Mortgage, Mrs. Olster,
14 Telese, Builders Financial, The Jet Group, InSouth, Southern Financial and National Fund
15 Control caused funding for all of Alev's loans – including all loans that were current and
16 required no extensions – to be frozen. Olster conspired through his various companies and
17 related lenders and with National Fund Control, LLC to stop funding on each and every
18 Alev project, even where the loans were current. As a direct result, all of Alev's projects
19 were halted; Alev's contractors, subcontractors and suppliers went unpaid; and marketing
20 for Alev's projects for resale was halted. This unilateral act by Olster and his co-
21 conspirators resulted in all of Alev's projects suffering severe economic duress and
22 damages.

23 34. In addition, defendants Olster and Builders Financial withheld other agreed
24 upon loans – including a loan to purchase a project know as Valdes Drive, LLC where Alev
25 had paid the fees associated with the loan and had received defendants' approval for the
26 loan – thereby depriving Alev of anticipated profits from the development and resale of
27 these additional properties.

35. Defendant Apollo Funding has instituted foreclosures against Alev's California properties – namely, the Wishbone Way, Steele Canyon 2, Steele Canyon 14, Steele Canyon 33, Draper Plaza and Dove Hollow properties. Until Olster conspired with National Fund Control to stop funding the California projects, each loan on the California properties was current. Olster is attempting through Apollo Funding's foreclosures against the California properties to coerce Alev into capitulating to Olster's demands to release him from liability and to cross-collateralize all existing loans.

36. In addition, defendants have miscalculated and overcharged plaintiffs for interest accruing under the loans on at least ten occasions. Plaintiffs' requests to defendants Olster, Builders Financial and others to correct these overcharges have been ignored or rectified after considerable intervention.

37. Plaintiffs are informed and believe, and on that basis allege, that at all times material to this action, Olster, Mrs. Olster, Telese, Apollo Mortgage, Apollo Funding, Builders Financial and The Jet Group were the agents of InSouth and Southern Financial, including pursuant to the provisions of contracts between them, and that in doing the acts alleged herein, Olster, Mrs. Olster, Telese, Apollo Mortgage, Apollo Funding, Builders Financial and The Jet Group were acting within the course and scope of that agency and with the permission and consent of InSouth and Southern Financial.

38. Plaintiffs are further informed and believe, and on that basis allege, that in the course of such agency relationship, InSouth and Southern Financial, as principals, directed and/or ratified the wrongful conduct of Olster, Mrs. Olster, Telese, Apollo Funding, Apollo Mortgage, Builders Financial and/or The Jet Group alleged herein.

ALTER EGO ALLEGATIONS

39. Plaintiffs allege on information and belief that at all relevant times there existed, and now exists, a unity of interest and ownership between Olster, Mrs. Olster and Telese, on the one hand, and Apollo Funding, Apollo Mortgage, Builders Financial and The Jet Group, on the other hand, such that any individuality and separateness between Olster,

1 Mrs. Olster and Telese, on the one hand, and Apollo Funding, Apollo Mortgage, Builders
2 Financial and The Jet Group, on the other hand, has ceased. Plaintiffs allege on
3 information and belief that Apollo Funding, Apollo Mortgage, Builders Financial and The
4 Jet Group, on the one hand, and Olster, Mrs. Olster and Telese, on the other hand, are the
5 alter egos of each other for at least the following reasons:

6 (a) At all relevant times, Apollo Funding, Apollo Mortgage, Builders Financial
7 and The Jet Group were so inadequately capitalized that, compared with the business to be
8 done by them and the associated risks, their capitalization was trifling; and/or

9 (b) Olster, Mrs. Olster and Telese used the assets of Apollo Funding, Apollo
10 Mortgage, Builders Financial and The Jet Group to be transferred to them and/or their sham
11 corporations without adequate consideration, and withdrew, transferred and/or
12 manipulated funds from the corporate bank accounts, other bank accounts and to and from
13 their sham corporations for their use without adequate consideration; and/or

14 (c) Apollo Funding, Apollo Mortgage, Builders Financial and The Jet Group were
15 mere shells, instrumentalities and conduits through which Olster, Mrs. Olster and Telese
16 exercised complete control of the businesses to such an extent that any individuality or
17 separateness of Apollo Funding, Apollo Mortgage, Builders Financial and The Jet Group on
18 the one hand, and Olster, Mrs. Olster and Telese (and other corporations under their
19 individual or joint control), on the other hand, does not, and at all relevant times, did not
20 exist; and/or

21 (d) Corporate formalities were not observed by Apollo Funding, Apollo
22 Mortgage, Builders Financial and The Jet Group; and/or

23 (e) Olster, Mrs. Olster and Telese (and/or other corporations under their
24 individual or joint control) entered into transactions with Apollo Funding, Apollo Mortgage,
25 Builders Financial and The Jet Group without the approval of any disinterested directors or
26 shareholders and/or without adequate consideration.

27 40. Plaintiffs allege on information and belief that adherence to the fiction of the
28

1 separate existence of Apollo Funding, Apollo Mortgage, Builders Financial and The Jet
2 Group as entities separate and distinct from Olster, Mrs. Olster and Telese would permit
3 abuse of the corporate privilege and would sanction a fraud on the creditors of Apollo
4 Funding, Apollo Mortgage, Builders Financial and The Jet Group, all for the purpose of
5 avoiding and preventing attachment and execution by creditors, including plaintiffs,
6 thereby rendering Apollo Funding, Apollo Mortgage, Builders Financial and The Jet Group
7 unable to meet their financial obligations.

8 CLAIMS FOR RELIEF

9 FIRST CLAIM FOR RELIEF – FRAUD

10 First Count – Affirmative Misrepresentation

11 41. Plaintiffs incorporate by reference the allegations contained in paragraphs 1
12 through 40 above, as fully and to the same extent as if set forth at length again in this
13 paragraph.

14 42. Each of the representations in Paragraphs 24, 25 and 29 above were false. The
15 truth was: The buy-back feature was a sham, and The Jet Group had no intention of ever
16 buying back any of the properties and did not have the financial ability to do so; none of
17 the defendants were licensed to act as mortgage brokers within the States of Arizona or
18 California; defendants did not intend to honor the terms of the loan agreements; and
19 defendants did not intend to extend the loan due-dates as promised.

20 43. Defendants, and each of them, made and/or ratified these misrepresentations
21 knowing them to be false. Defendants, and each of them, made and/or ratified these
22 misrepresentations with the intent to defraud plaintiffs, and intended that plaintiffs rely
23 upon them to their detriment. Plaintiffs reasonably believed the misrepresentations to be
24 true, and did in fact rely upon them to their detriment.

25 44. Plaintiffs suffered damages as a direct proximate result of the
26 misrepresentations, including but not limited to, (a) payment of unearned broker's
27 commissions of approximately \$1,000,000.00; (b) payment of additional points to
28

1 defendants in return for the assurance that The Jet Group would honor the buy-back
2 feature; (c) payments to The Jet Group for its commitment to buy back the properties at
3 appraised value; (d) damages caused by defendants' refusal to fund loan draws in
4 accordance with the loan agreements; (e) damages caused by defendants' failure or refusal
5 to extend loans; (f) and other related payments and liabilities.

6 45. As additional damages against defendants, and each of them, plaintiffs allege
7 that defendants were guilty of malice, fraud and oppression, and plaintiffs should recover,
8 in addition to actual damages, damages in an amount to make an example of and to punish
9 defendants.

10 Second Count – Deceit by Concealment

11 46. Plaintiffs incorporate by reference the allegations contained in paragraphs 1
12 through 40 above, as fully and to the same extent as if set forth at length again in this
13 paragraph.

14 47. Olster concealed or suppressed from plaintiffs that he had been convicted of the
15 crimes of embezzlement and several counts of forgery by the State of New Jersey in 1989;
16 that he was imprisoned for his fraud and embezzlement; and that he had been disbarred by
17 the State of Pennsylvania because of his criminal conduct as a result.

18 48. Olster also failed to disclose that neither he nor Apollo Mortgage were licensed
19 in Arizona to act as a mortgage brokers in negotiating and obtaining mortgage loans for
20 plaintiffs.

21 49. Olster and the other defendants conspired to conceal these facts from plaintiffs
22 with the intent to defraud and induce plaintiffs to act as described above. At the time
23 plaintiffs entered into the transactions with defendants, plaintiffs were unaware of the
24 concealed and suppressed facts. Had plaintiffs known of Olster's fraudulent criminal past,
25 they would not have entered into any business transactions with Olster and the other
26 defendants, and would not have reposed trust and confidence in Olster as their exclusive
27 broker in obtaining critical financing for their projects. Likewise, had plaintiffs known that
28

1 Olster and Apollo Mortgage were unlicensed, they would not have relied upon Olster or
2 Apollo Mortgage to act as their mortgage brokers in obtaining financing for the projects, or
3 in providing personal guarantees for those loans.

4 50. Plaintiffs suffered damages as a direct proximate result of defendants'
5 concealment, including but not limited to, (a) payment of unearned broker's commissions
6 of approximately \$1,000,000.00; (b) payment of additional points to defendants in return
7 for the assurance that The Jet Group would honor the buy-back feature; (c) payments to The
8 Jet Group for its commitment to buy back the properties at appraised value; (d) damages
9 caused by defendants' refusal to fund loan draws in accordance with the loan agreements;
10 (e) damages caused by defendants' failure or refusal to extend loans; (f) and other related
11 payments and liabilities.

12 51. As additional damages against defendants, and each of them, plaintiffs allege
13 that defendants were guilty of malice, fraud and oppression, and plaintiffs should recover,
14 in addition to actual damages, damages in an amount to make an example of and to punish
15 defendants.

16 Third Count – Negligent Misrepresentation

17 52. Plaintiffs incorporate by reference the allegations contained in paragraphs 1
18 through 40 above, as fully and to the same extent as if set forth at length again in this
19 paragraph.

20 53. As an alternative count to counts one and two above, plaintiffs allege that
21 defendants made and/or ratified the misrepresentations alleged above negligently and/or
22 with no reasonable belief in the truth thereof, and that defendants negligently omitted to
23 state the material facts described above.

24 54. Each of the representations in Paragraphs 24, 25 and 29, above were false. The
25 truth was: The buy-back feature was a sham, and The Jet Group had no intention of ever
26 buying back any of the properties; none of the defendants were licensed to act as mortgage
27 brokers within the State of Arizona; defendants did not intend to honor the terms of the
28

1 loan agreements; and defendants did not intend to extend the loan due-dates as promised.

2 55. Plaintiffs reasonably believed the misrepresentations to be true, and did in fact
3 rely upon them to their detriment.

4 56. At the time plaintiffs entered into the transactions with defendants, plaintiffs
5 were unaware of the concealed and suppressed facts. Had plaintiffs known of Olster's
6 fraudulent criminal past, they would not have entered into any business transactions with
7 Olster and the other defendants, and would not have reposed trust and confidence in
8 Olster as their exclusive broker in obtaining critical financing for their projects. Likewise,
9 had plaintiffs known that Olster and Apollo Mortgage were unlicensed, they would not
10 have relied upon Olster or Apollo Mortgage to act as their mortgage brokers in obtaining
11 financing for the projects, or in providing personal guarantees for those loans.

12 57. Plaintiffs suffered damages as a direct proximate result of the misrepresentations
13 and concealment, including but not limited to, (a) payment of unearned broker's
14 commissions of approximately \$1,000,000.00; (b) payment of additional points to
15 defendants in return for the assurance that The Jet Group would honor the buy-back
16 feature; (c) payments to The Jet Group for its commitment to buy back the properties at
17 appraised value; (d) damages caused by defendants' refusal to fund loan draws in
18 accordance with the loan agreements; (e) damages caused by defendants' failure or refusal
19 to extend loans, (f) and other related payments and liabilities.

20 SECOND CLAIM FOR RELIEF – BREACH OF FIDUCIARY DUTY

21 58. Plaintiffs incorporate by reference the allegations contained in paragraphs 1
22 through 40 above, as fully and to the same extent as if set forth at length again in this
23 paragraph.

24 59. As plaintiffs' brokers, Olster and Apollo Mortgage owed plaintiffs a fiduciary
25 duty, and were obligated to represent plaintiffs' interests fairly, diligently and in strict
26 accordance with all applicable state and federal banking statutes and regulations.

27 60. In misrepresenting the terms under which loans were made and falsely stating
28

1 that The Jet Group would buy-back the subject projects upon request, Olster and Apollo
2 Mortgage violated their fiduciary duties to plaintiffs. In addition, by favoring the interests of
3 the lenders over those of plaintiffs, Olster and Apollo Mortgage further violated their
4 fiduciary duties.

5 61. In addition to the over forty (40) loans that Olster and Apollo Mortgage
6 brokered for plaintiffs, defendants negotiated and promised dozens of other loans which
7 were withheld in an effort to coerce and pressure plaintiffs into making additional
8 concessions to defendants.

9 62. Plaintiffs suffered damages as a direct proximate result of defendants' breach of
10 fiduciary duty, including but not limited to, (a) payment of unearned broker's commissions
11 of approximately \$1,000,000.00; (b) payment of additional points to defendants in return
12 for the assurance that The Jet Group would honor the buy-back feature; (c) payments to The
13 Jet Group for its commitment to buy back the properties at appraised value; (d) damages
14 caused by defendants' refusal to fund loan draws in accordance with the loan agreements;
15 (e) damages caused by defendants' failure or refusal to extend loans; (f) and other related
16 payments and liabilities.

17 THIRD CLAIM FOR RELIEF – BREACH OF CONTRACTS

18 63. Plaintiffs incorporate by reference the allegations contained in paragraphs 1
19 through 40 above, as fully and to the same extent as if set forth at length again in this
20 paragraph.

21 64. Since on or about January 1, 1999 and continuously through the present,
22 defendants have breached the loan commitments to plaintiffs by failing to fund
23 development of plaintiffs' existing projects, and by refusing to fund additional promised
24 loans for other planned projects.

25 65. Defendants further violated the covenant of good faith and fair dealing implied
26 by law in every agreement by acting or declining to act in such a way as to deprive
27 plaintiffs of the benefit of their bargains.

66. Plaintiffs have performed all obligations to defendants except those obligations plaintiffs were prevented or excused from performing.

67. Plaintiffs suffered damages caused by defendants' breach of contracts in the following respects: (a) compensatory damages in an amount to be proven at trial, together with interest thereon at the legal rate from date of breach until date of recovery; (b) loss of profit on resale of properties; (c) and for costs of suit including attorneys' fees.

FOURTH CLAIM FOR RELIEF – ACCOUNTING

68. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again in this paragraph.

69. As a result of defendants' actions, defendants have been unjustly enriched at plaintiffs' expense. The precise amount of the benefit retained by defendants as a result of their wrongful conduct is sufficiently uncertain as to require an accounting in order to ascertain the exact damages due to plaintiffs.

FIFTH CLAIM FOR RELIEF – REFUND OF UNEARNED COMMISSIONS

70. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again in this paragraph.

71. Olster and Apollo Mortgage acted as mortgage brokers in Arizona by negotiating and obtaining the above loans on behalf of the plaintiff entities as borrowers, and Alev and BAM as guarantors. Virtually all borrowers, and both guarantors are residents of, or are incorporated in, Arizona. Olster and Apollo Mortgage were required to possess valid Arizona mortgage broker's licenses to conduct brokerage activities in that state, and were not permitted to receive broker's commissions arising out of such brokerage activities within Arizona without holding a valid Arizona broker's license.

72. Plaintiffs paid to Olster and Apollo Mortgage broker commissions in excess of \$1,000,000.00 arising out of the unlicensed brokerage activities in Arizona.

73. Olster and Apollo Mortgage are obligated to refund the unearned, illegally obtained commissions.

SIXTH CLAIM FOR RELIEF – USURY

74. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again in this paragraph.

75. Within the applicable limitation period(s), plaintiffs, pursuant to their contracts with defendants, have paid monies to defendants, including accumulated points and loan origination fees, in order to secure funding for plaintiffs' projects. Plaintiffs further allege that InSouth and Southern Financial purchased, took over and otherwise acquired such contracts from certain of the defendants.

76. The payment terms of the contracts are usurious and violate the usury laws of California, Arizona and Tennessee, as well as federal law, which each prescribe limitations on the lawful interest rate, and charges, fees and commissions, that may be imposed under such contracts.

77. The payments made by plaintiffs were in excess of the maximum rate of interest allowed by the usury laws of California, Arizona and Tennessee, as well as federal law, and plaintiffs are entitled to recover double and treble the amount of those payments.

SEVENTH CLAIM FOR RELIEF – VIOLATION OF BUSINESS

AND PROFESSIONS CODE SECTION 17200 ET SEQ.

78. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again in this paragraph.

79. By virtue of defendants' acts as alleged above, defendants are engaged in unlawful and unfair trade practices. Plaintiffs, on their own behalf as well as on behalf of the general public, seek recovery from defendants for violations of California Business & Professions Code section 17200 et seq.

1 80. By reason of the foregoing, defendants have been improperly and unjustly
2 enriched at the expense of plaintiffs and the public in an amount as yet unascertained, in
3 a sum to be proven at the time of trial so that defendants can make appropriate restitution.

4 81. Plaintiffs and the public are being irreparably harmed by defendants' unfair
5 trade practices and unfair competition. There is no adequate remedy at law, thereby
6 justifying injunctive relief.

7 82. Plaintiffs further request an award of all attorney's fees and costs associated
8 with the bringing of this action under California Business & Professions Code section
9 17200 et seq.

10 WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

- 11 1. Damages in an amount to be proven at trial.
 - 12 2. A mandatory injunction directing defendants to resume funding the subject
13 loans.
 - 14 3. An injunction staying all efforts by defendants to foreclose on the subject
15 California properties pending trial in this matter.
 - 16 4. Punitive damages in an amount to punish defendants and deter other
17 fraudulent and oppressive conduct.
 - 18 5. For the assessment of double and treble damages against defendants.
 - 19 6. Interest according to proof.
 - 20 7. For an accounting from defendants of all monies and other benefits due
21 plaintiffs.
 - 22 8. For restitution of all monies gained by defendants as a result of their unlawful
23 acts.
 - 24 9. For reasonable attorneys' fees.
 - 25 10. For all other relief the Court finds proper.
- 26
27
28

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

DATED: May 9, 2000

SOLOMON WARD SEIDENWURM & SMITH, LLP

By Norman L. Smith

NORMAN L. SMITH
RICHARD E. MCCARTHY
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Enterprises, LLC, 2903 Wishbone Way, LLC, Steele
Canyon 2, LLC, Steele Canyon 14, LLC, Steele
Canyon 33, LLC, Dove Hollow, LLC, P.P.B., LLC

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F I L E D
STEPHEN THUNBERG
Clerk of the Superior Court

MAY 16 2000

By: D LIM, Deputy

Attorneys for Defendants and Cross-Complainants

IN THE SUPERIOR COURT OF CALIFORNIA

SAN DIEGO COUNTY

11 APOLLO FUNDING CORP., a Delaware
12 corporation,

Plaintiff,

v.

15 BENJAMIN A. ALEV, an individual;
16 AMNON KAWA, an individual; DRAPER
17 PLAZA, LLC, a Nevada limited liability
18 company; AMKA HOLDINGS, LLC, a
19 Nevada limited liability company; BAM
20 INVESTMENT, INC., an Arizona
21 corporation; ABA, LLC, a Nevada limited
22 liability company; BENJAMIN A. ALEV,
23 TRUSTEE OF THE KTB IRREVOCABLE
24 TRUST, ALKA ENTERPRISES, LLC, an
25 Arizona limited liability company; STEELE
26 CANYON 2, LLC, an Arizona limited
27 liability company; STEELE CANYON 14,
28 LLC, an Arizona limited liability company;
STEELE CANYON 33, LLC, an Arizona
limited liability company; DOVE
HOLLOW, LLC, an Arizona limited
liability company; and DOES 1 through
200, inclusive,

Defendants.

BENJAMIN A. ALEV, an individual;
DRAPER PLAZA, LLC, a Nevada limited
liability company; BAM INVESTMENT,

Case No.: GIC 732437

SECOND AMENDED CROSS-
COMPLAINT

I/C JUDGE: CHARLES R. HAYES
DEPT. 66

Action Filed: July 9, 1999

P:0146724.01:07495.002 28-Apr-00

COPY

1 INC., an Arizona corporation; ABA, LLC, a
 2 Nevada limited liability company;
 3 BENJAMIN A. ALEV, TRUSTEE OF THE
 4 KTB IRREVOCABLE TRUST; ALKA
 5 ENTERPRISES, LLC, an Arizona limited
 6 liability company; STEELE CANYON 2,
 7 LLC, an Arizona limited liability company;
 8 STEELE CANYON 14, LLC, an Arizona
 9 limited liability company; STEELE
 10 CANYON 33, LLC, an Arizona limited
 11 liability company; DOVE HOLLOW, LLC,
 12 an Arizona limited liability company, 2903
 13 WISHBONE WAY, LLC, an Arizona limited
 14 liability company; P.P.B., LLC, an Arizona
 15 limited liability company,

16 Cross-complainants,

17 v.

18 APOLLO FUNDING CORP., a Delaware
 19 corporation, BRUCE A. OLSTER, an
 20 individual, APOLLO MORTGAGE &
 21 FINANCIAL SERVICES, INC., a Florida
 22 corporation, MADELINE OLSTER, an
 23 individual, JOSEPH E. TELESE, an
 24 individual, BUILDERS FINANCIAL
 25 GROUP INCORPORATED, a Delaware
 26 corporation, NATIONAL FUND
 27 CONTROL, LLC, a Colorado corporation,
 28 THE JET GROUP CORP., a Delaware
 corporation, INSOUTH BANK, a
 Tennessee corporation, SOUTHERN
 FINANCIAL, INC., a Tennessee
 corporation, and ROES 1 through 200,
 inclusive,

Cross-defendants.

Cross-complainants allege as follows:

I.

THE PARTIES

1. Cross-complainant BENJAMIN A. ALEV ("Alev") is an individual residing in the State of Arizona. Alev is the trustee of cross-complainant the KTB Irrevocable Trust. The KTB Irrevocable Trust ("KTB") is the sole member of cross-complainant ABA, LLC, a limited liability company. ABA, LLC ("ABA") is a limited liability company organized and

1 existing under the laws of the State of Nevada, having its principal place of business in
2 Carson City, Nevada and is authorized to do business in California.

3 2. Cross-complainant P.P.B., LLC ("PPB") is a limited liability company organized
4 and existing under the laws of the State of Arizona, having its principal place of business in
5 Tucson, Arizona.

6 3. Cross-complainant DRAPER PLAZA, LLC ("Draper") is a limited liability
7 company organized and existing under the laws of the State of Nevada, having its principal
8 place of business in Carson City, Nevada and is authorized to do business in California.

9 4. Cross-complainant BAM INVESTMENT, INC. ("BAM") is a corporation organized
10 and existing under the laws of the State of Arizona, having its principal place of business in
11 Tucson, Arizona and is authorized to do business in California.

12 5. Cross-complainant ALKA ENTERPRISES, LLC ("ALKA") is a limited liability
13 company organized and existing under the laws of the State of Arizona, having its principal
14 place of business in Tucson, Arizona and is authorized to do business in California.

15 6. Cross-complainant 2903 WISHBONE WAY, LLC ("Wishbone") is a limited
16 liability company organized and existing under the laws of the State of Arizona, having its
17 principal place of business in Tucson, Arizona and is authorized to do business in
18 California.

19 7. Cross-complainant STEELE CANYON 2, LLC ("Steele 2") is a limited liability
20 company organized and existing under the laws of the State of Arizona, having its principal
21 place of business in Tucson, Arizona and is authorized to do business in California.

22 8. Cross-complainant STEELE CANYON 14, LLC ("Steele 14") is a limited liability
23 company organized and existing under the laws of the State of Arizona, having its principal
24 place of business in Tucson, Arizona and is authorized to do business in California.

25 9. Cross-complainant STEELE CANYON 33, LLC ("Steele 33") is a limited liability
26 company organized and existing under the laws of the State of Arizona, having its principal
27 place of business in Tucson, Arizona and is authorized to do business in California.

1 10. Cross-complainant DOVE HOLLOW, LLC ("Dove") is a limited liability
2 company organized and existing under the laws of the State of Arizona, having its principal
3 place of business in Tucson, Arizona and is authorized to do business in California. Alev,
4 Draper, BAM, ABA, ALKA, Wishbone, Steele 2, Steele 14, Steele 33, PPB, KTB and Dove
5 are collectively referred to herein as "Cross-complainants."

6 11. Cross-complainants are informed and believe, and on that basis allege, that at
7 all times material to this action, cross-defendant BRUCE A. OLSTER ("Olster") is, and at all
8 times relevant was, a citizen of Florida, in Pinellas County, Florida.

9 12. Cross-complainants are informed and believe, and on that basis allege, that at
10 all times material to this action, cross-defendant APOLLO FUNDING CORP. ("Apollo
11 Funding") was and is a corporation organized and existing under the laws of the State of
12 Delaware, with its principal place of business in the State of Florida.

13 13. Cross-complainants are informed and believe, and on that basis allege, that at
14 all times material to this action, cross-defendant APOLLO MORTGAGE & FINANCIAL
15 SERVICES, INC. ("Apollo Mortgage") was a corporation organized and existing under the
16 laws of the State of Florida. Cross-complainants are informed and believe, and on that basis
17 allege, that Apollo Mortgage filed a voluntary dissolution in Florida in or about May, 1999.

18 14. Cross-complainants are informed and believe, and on that basis allege, that at
19 all times material to this action, cross-defendant MADELINE OLSTER ("Mrs. Olster") is, and
20 at all times relevant was, a citizen of Florida, in Pinellas County, Florida. Mrs. Olster is
21 Olster's wife, and cross-complainants are informed and believe, and on that basis allege,
22 that she acted as the officer, director and/or agent of one or more of the cross-defendants.

23 15. Cross-complainants are informed and believe, and on that basis allege, that at
24 all times material to this action, cross-defendant JOSEPH E. TELESE ("Telese") is, and at all
25 times relevant was, a citizen of Florida, and held the title of president of cross-defendant
26 BUILDERS FINANCIAL GROUP INCORPORATED.

27 16. Cross-complainants are informed and believe, and on that basis allege, that at
28

1 all times material to this action, cross-defendant BUILDERS FINANCIAL GROUP
2 INCORPORATED ("Builders Financial") was and is a corporation organized and existing
3 under the laws of the State of Florida with its principal place of business in the State of
4 Florida.

5 17. Cross-complainants are informed and believe, and on that basis allege, that at
6 all times material to this action, cross-defendant NATIONAL FUND CONTROL, LLC was
7 and is a limited liability company organized and existing under the laws of the State of
8 Colorado, with its principal place of business in the State of Colorado.

9 18. Cross-complainants are informed and believe, and on that basis allege, that at
10 all times material to this action, cross-defendant THE JET GROUP CORP. ("The Jet Group")
11 was and is a corporation organized and existing under the laws of the State of Delaware,
12 with its principal place of business in the State of Florida.

13 19. Plaintiffs are informed and believe, and on that basis allege, that at all times
14 material to this action, cross-defendant INSOUTH BANK ("InSouth") was and is a
15 corporation organized and existing under the laws of the State of Tennessee, with its
16 principal place of business in the State of Tennessee.

17 20. Plaintiffs are informed and believe, and on that basis allege, that at all times
18 material to this action, cross-defendant SOUTHERN FINANCIAL, INC. ("Southern
19 Financial") was and is a corporation organized and existing under the laws of the State of
20 Tennessee, with its principal place of business in the State of Tennessee.

21 21. The true names and capacities, whether individual, corporate, associate, or
22 otherwise, of the cross-defendants sued herein as ROES 1 through 200, inclusive, are
23 unknown to cross-complainants, who therefore sue said cross-defendants by such fictitious
24 names. Cross-complainants will amend this Cross-complaint to allege their true names and
25 capacities when ascertained. Cross-complainants are informed and believe, and thereon
26 allege, that each of such fictitiously named cross-defendants is responsible in some manner
27 for the occurrences alleged and that cross-complainants' damages as alleged were

proximately caused by said cross-defendants' conduct.

22. Cross-complainants are informed and believe, and on that basis allege, that at all times material to this action, cross-defendants and each of them, conspired among themselves and with others – including officers, employees, agents, undisclosed lenders and attorneys – to carry out the acts described below. Cross-complainants are informed and believe, and on that basis allege, that in the course and scope of such conspiracy, cross-defendants and each of them, performed, aided, encouraged, or ratified performance of the wrongful acts set out below in this Cross-complaint.

II.

FACTS COMMON TO ALL CAUSES OF ACTION

23. Cross-complainant Alev has been involved in real estate development since approximately 1983. Over the years, he developed dependable financing sources for his business.

24. In or about 1996, Alev was introduced to cross-defendant Olster. Olster represented to Alev that he was a mortgage broker with a wide network of unique financing opportunities. Olster represented that through his companies – Builders Financial, Apollo Mortgage, and Apollo Funding – he would assist Alev in obtaining construction loans, development loans, and other loan and funding options that would be of great benefit to Alev's business. During the course of the relationship, Olster represented that he had a pool of \$100,000,000 to \$150,000,000 of development financing at his disposal. Olster further represented that Alev would be one of only five national developers who would have access to this financing pool. Most importantly, Olster represented that the lenders he represented provided a unique financing arrangement through an Olster-related entity, The Jet Group. Olster and his lenders, through The Jet Group, would guaranty purchase of the subject projects at purchase prices based upon appraisals, thereby providing cross-complainants the benefit of a standby or back-up purchase commitment which would guaranty purchase of the properties. For this important commitment, and in reliance on

1 cross-defendants' representations and promises, cross-complainants paid fees equal to 2.5%
2 of each loan amount to The Jet Group for the issuance of its standby purchase
3 commitments to repurchase the properties at appraised value if so desired by cross-
4 complainants.

5 25. Olster and Alev developed a relationship based upon trust, and Alev began
6 relying exclusively upon Olster and his companies and related lenders to supply the critical
7 funding for Alev's development projects. As part of this relationship, Olster represented to
8 Alev that he was able to act as a mortgage broker to secure loans for Alev's projects in
9 Arizona and California and would assist Alev in developing properties in those states.

10 26. Since 1996, Olster and his affiliated lenders made and/or brokered over forty
11 (40) loans for Alev's projects. Olster and his companies were paid approximately
12 \$1,000,000 in fees on these loans.

13 27. The projects funded through these loans included projects developed in
14 Arizona, and several more in California. Loan commitments were brokered by Olster
15 through Apollo Mortgage. Olster provided Alev with loan commitments through Builders
16 Financial. Olster in turn provided Alev with funding through Apollo Funding. Cross-
17 complainants have since discovered that other additional undisclosed lenders, including
18 InSouth and Southern Financial, have been involved and that Apollo Funding secretly
19 transferred certain loans to these lenders. Such lenders acted in concert with certain of the
20 cross-defendants.

21 28. Through these various Olster entities, Alev was able to develop several projects,
22 and the loans were used to pay the critical construction and development costs necessary
23 for Alev's projects to succeed and return a profit. Cross-complainants attach as Exhibits "1"
24 - "36" copies of the loan and certain operative documents, which Exhibits are incorporated
25 herein by this reference.

26 29. One of Alev's projects in Arizona - Plaza Pueblo Bonito, LLC (hereafter
27 "P.P.B.") - involved fifteen lots under development. Olster brokered and provided separate
28

1 loans through his companies to develop each individual lot. By the end of 1998, it was
2 necessary for Alev to request an extension on the P.P.B. loans. Alev and Olster had agreed
3 from the inception that the lots could not be completely developed within the initial short-
4 term loan period, and it would be necessary to later extend the due dates for the loans. As
5 it developed, the project required certain design changes because of local city
6 requirements. These changes resulted in delays in completing the improvements. This in
7 turn necessitated increased funding to cover the delays, redesigns and improvements. Alev
8 informed Olster of these facts, and Olster directed Alev to take the necessary funds out of
9 certain finished item categories of the construction draw schedule. Olster promised that the
10 additional costs would be funded later.

11 30. Despite Olster's promises that the P.P.B. loans would be extended before they
12 came due on December 31, 1998, Olster attempted to coerce Alev into making drastic
13 concessions on Alev's other projects as a precondition to extending the P.P.B. loans. On or
14 about December 18, 1998, Olster's attorneys provided him with a draft agreement to
15 forward to Alev that would have required Alev to cross-collateralize all his various projects,
16 and provide them as additional security for the P.P.B. loans. In addition, the proposed
17 agreement went far beyond a loan modification, and included a release in favor of Olster
18 and his companies from any and all liabilities, including for fraud, misrepresentation and
19 breaches of fiduciary duty.

20 31. Despite receiving the draft agreement from his attorneys on or about December
21 19, 1999, Olster waited to forward it to Alev until late in the evening of December 30,
22 1998. Olster sent the proposal by facsimile to Alev along with instructions that the
23 agreement and related loan documents must be reviewed by Alev's attorney, signed and
24 returned no later than the next morning, December 31, 1998 – New Year's Eve. However,
25 Alev was out of town and did not even receive the proposed loan modification and release
26 until after the P.P.B. loans' due dates. When Alev did review the proposed loan
27 modifications and release, Alev refused to even consider agreeing to what he believed to

1 be coercive and unfair changes both to the P.P.B. loans, and to all the other loans for his
2 other projects unrelated to P.P.B.

3 32. In response to Alev's refusal to release Olster and Alev's refusal to cross-
4 collateralize his various projects, Olster, Apollo Funding, Apollo Mortgage, Mrs. Olster,
5 Telese, Builders Financial, The Jet Group, InSouth, Southern Financial and National Fund
6 Control caused funding for all of Alev's loans – including all loans that were current and
7 required no extensions – to be frozen. Olster conspired through his various companies and
8 related lenders and with National Fund Control, LLC to stop funding on each and every
9 Alev project, even where the loans were current. As a direct result, all of Alev's projects
10 were halted; Alev's contractors, subcontractors and suppliers went unpaid; and marketing
11 for Alev's projects for resale was halted. This unilateral act by Olster and his co-
12 conspirators resulted in all of Alev's projects suffering severe economic duress and
13 damages.

14 33. In addition, cross-defendants Olster and Builders Financial withheld other
15 agreed upon loans – including a loan to purchase a project known as Valdes Drive, LLC
16 where Alev had paid the fees associated with the loan and had received cross-defendants'
17 approval for the loan – thereby depriving Alev of anticipated profits from the development
18 and resale of these additional properties.

19 34. Cross-defendant Apollo Funding has instituted foreclosures against Alev's
20 California properties – namely, the Wishbone Way, Steele Canyon 2, Steele Canyon 14,
21 Steele Canyon 33, Draper Plaza and Dove Hollow properties. Until Olster conspired with
22 National Fund Control to stop funding the California projects, each loan on the California
23 properties was current. Olster is attempting through Apollo Funding's foreclosures against
24 the California properties to coerce Alev into capitulating to Olster's demands to release him
25 from liability and to cross-collateralize all existing loans.

26 35. In addition, cross-defendants have miscalculated and overcharged cross-
27 complainants for interest accruing under the loans on at least ten occasions. Cross-

1 complainants' requests to cross-defendants Olster, Builders Financial and others to correct
2 these overcharges have been ignored or rectified after considerable intervention.

3 36. Plaintiffs are informed and believe, and on that basis allege, that at all times
4 material to this action, Olster, Mrs. Olster, Telese, Apollo Mortgage, Apollo Funding,
5 Builders Financial and/or The Jet Group were the agents of InSouth and Southern Financial,
6 including pursuant to the provisions of contracts between them, and that in doing the acts
7 alleged herein, Olster, Mrs. Olster, Telese, Apollo Mortgage, Apollo Funding, Builders
8 Financial and The Jet Group were acting within the course and scope of that agency and
9 with the permission and consent of InSouth and Southern Financial.

10 37. Plaintiffs are further informed and believe, and on that basis allege, that in the
11 course of such agency relationship, InSouth and Southern Financial, as principals, directed
12 and/or ratified the wrongful conduct of Olster, Mrs. Olster, Telese, Apollo Funding, Apollo
13 Mortgage, Builders Financial and The Jet Group alleged herein.

14 38. In connection with the acts alleged, defendants directly or indirectly used the
15 means and instrumentalities of interstate commerce, including United States Mail and
16 interstate wire communications.

17 ALTER EGO ALLEGATIONS

18 39. Cross-complainants allege on information and belief that at all relevant times
19 there existed, and now exists, a unity of interest and ownership between Olster, Mrs. Olster
20 and Telese, on the one hand, and Apollo Funding, Apollo Mortgage, Builders Financial and
21 The Jet Group, on the other hand, such that any individuality and separateness between
22 Olster, Mrs. Olster and Telese, on the one hand, and Apollo Funding, Apollo Mortgage,
23 Builders Financial and The Jet Group, on the other hand, has ceased. Cross-complainants
24 allege on information and belief that Apollo Funding, Apollo Mortgage, Builders Financial
25 and The Jet Group, on the one hand, and Olster, Mrs. Olster and Telese, on the other hand,
26 are the alter egos of each other for at least the following reasons:

27 (a) At all relevant times, Apollo Funding, Apollo Mortgage, Builders Financial

1 and The Jet Group were so inadequately capitalized that, compared with the business to be
2 done by them and the associated risks, their capitalization was trifling; and/or

3 (b) Olster, Mrs. Olster and Telese used the assets of Apollo Funding, Apollo
4 Mortgage, Builders Financial and The Jet Group to be transferred to them and/or their sham
5 corporations without adequate consideration, and withdrew, transferred and/or
6 manipulated funds from the corporate bank accounts, other bank accounts and to and from
7 their sham corporations for their use without adequate consideration; and/or

8 (c) Apollo Funding, Apollo Mortgage, Builders Financial and The Jet Group were
9 mere shells, instrumentalities and conduits through which Olster, Mrs. Olster and Telese
10 exercised complete control of the businesses to such an extent that any individuality or
11 separateness of Apollo Funding, Apollo Mortgage, Builders Financial and The Jet Group on
12 the one hand, and Olster, Mrs. Olster and Telese (and other corporations under their
13 individual or joint control), on the other hand, does not, and at all relevant times, did not
14 exist; and/or

15 (d) Corporate formalities were not observed by Apollo Funding, Apollo
16 Mortgage, Builders Financial and The Jet Group; and/or

17 (e) Olster, Mrs. Olster and Telese (and/or other corporations under their
18 individual or joint control) entered into transactions with Apollo Funding, Apollo Mortgage,
19 Builders Financial and The Jet Group without the approval of any disinterested directors or
20 shareholders and/or without adequate consideration.

21 40. Cross-complainants allege on information and belief that adherence to the
22 fiction of the separate existence of Apollo Funding, Apollo Mortgage, Builders Financial
23 and The Jet Group as entities separate and distinct from Olster, Mrs. Olster and Telese
24 would permit abuse of the corporate privilege and would sanction a fraud on the creditors
25 of Apollo Funding, Apollo Mortgage, Builders Financial and The Jet Group, all for the
26 purpose of avoiding and preventing attachment and execution by creditors, including cross-
27 complainants, thereby rendering Apollo Funding, Apollo Mortgage, Builders Financial and

1 The Jet Group unable to meet their financial obligations.

2 FIRST CAUSE OF ACTION

3 (Fraud)

4 A. Affirmative Misrepresentation

5 41. Cross-complainants incorporate by reference the allegations contained in
6 paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again
7 in this paragraph.

8 42. Each of the representations in Paragraphs 24, 25 and 29 above were false. The
9 truth was: The buy-back feature was a sham, and The Jet Group had no intention of ever
10 buying back any of the properties and did not have the financial ability to do so; none of
11 the cross-defendants were licensed to act as mortgage brokers within the States of Arizona
12 or California; cross-defendants did not intend to honor the terms of the loan agreements;
13 and cross-defendants did not intend to extend the loan due-dates as promised.

14 43. Cross-defendants, and each of them, made and/or ratified these
15 misrepresentations knowing them to be false. Cross-defendants, and each of them, made
16 and/or ratified these misrepresentations with the intent to defraud cross-complainants, and
17 intended that cross-complainants rely upon them to their detriment. Cross-complainants
18 reasonably believed the misrepresentations to be true, and did in fact rely upon them to
19 their detriment.

20 44. Cross-complainants suffered damages as a direct proximate result of the
21 misrepresentations, including but not limited to, (a) payment of unearned broker's
22 commissions of approximately \$1,000,000.00; (b) payment of additional points to cross-
23 defendants in return for the assurance that The Jet Group would honor the buy-back
24 feature; (c) payments to The Jet Group for its commitment to buy back the properties at
25 appraised value; (d) damages caused by cross-defendants' refusal to fund loan draws in
26 accordance with the loan agreements; (e) damages caused by cross-defendants' failure or
27 refusal to extend loans; (f) and other related payments and liabilities.

1 45. As additional damages against cross-defendants, and each of them, cross-
2 complainants allege that cross-defendants were guilty of malice, fraud and oppression, and
3 cross-complainants should recover, in addition to actual damages, damages in an amount
4 to make an example of and to punish cross-defendants.

5 B. Deceit by Concealment

6 46. Cross-complainants incorporate by reference the allegations contained in
7 paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again
8 in this paragraph.

9 47. Olster concealed or suppressed from cross-complainants that he had been
10 convicted of the crimes of embezzlement and several counts of forgery by the State of New
11 Jersey in 1989; that he was imprisoned for his fraud and embezzlement; and that he had
12 been disbarred by the State of Pennsylvania because of his criminal conduct as a result.

13 48. Olster also failed to disclose that neither he nor Apollo Mortgage were licensed
14 in Arizona to act as a mortgage brokers in negotiating and obtaining mortgage loans for
15 cross-complainants.

16 49. Olster and the other cross-defendants conspired to conceal these facts from
17 cross-complainants with the intent to defraud and induce cross-complainants to act as
18 described above. At the time cross-complainants entered into the transactions with cross-
19 defendants, cross-complainants were unaware of the concealed and suppressed facts. Had
20 cross-complainants known of Olster's fraudulent criminal past, they would not have
21 entered into any business transactions with Olster and the other cross-defendants, and
22 would not have reposed trust and confidence in Olster as their exclusive broker in
23 obtaining critical financing for their projects. Likewise, had cross-complainants known that
24 Olster and Apollo Mortgage were unlicensed, they would not have relied upon Olster or
25 Apollo Mortgage to act as their mortgage brokers in obtaining financing for the projects, or
26 in providing personal guarantees for those loans.

27 50. Cross-complainants suffered damages as a direct proximate result of cross-
28

1 defendants' concealment, including but not limited to, (a) payment of unearned broker's
2 commissions of approximately \$1,000,000.00; (b) payment of additional points to cross-
3 defendants in return for the assurance that The Jet Group would honor the buy-back
4 feature; (c) payments to the Jet Group for its commitment to buy back the properties at
5 appraised value; (d) damages caused by cross-defendants' refusal to fund loan draws in
6 accordance with the loan agreements; (e) damages caused by cross-defendants' failure or
7 refusal to extend loans; (f) and other related payments and liabilities.

8 51. As additional damages against cross-defendants, and each of them, cross-
9 complainants allege that cross-defendants were guilty of malice, fraud and oppression, and
10 cross-complainants should recover, in addition to actual damages, damages in an amount
11 to make an example of and to punish cross-defendants.

12 C. Negligent Misrepresentation

13 52. Cross-complainants incorporate by reference the allegations contained in
14 paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again
15 in this paragraph.

16 53. As an alternative count to counts one and two above, cross-complainants allege
17 that cross-defendants made and/or ratified the misrepresentations alleged above negligently
18 and/or with no reasonable belief in the truth thereof, and that cross-defendants negligently
19 omitted to state the material facts described above.

20 54. Each of the representations in Paragraphs 24, 25 and 29 above were false. The
21 truth was: The buy-back feature was a sham, and The Jet Group had no intention of ever
22 buying back any of the properties; none of the cross-defendants were licensed to act as
23 mortgage brokers within the State of Arizona; cross-defendants did not intend to honor the
24 terms of the loan agreements; and cross-defendants did not intend to extend the loan due-
25 dates as promised.

26 55. Cross-complainants reasonably believed the misrepresentations to be true, and
27 did in fact rely upon them to their detriment.

56. At the time cross-complainants entered into the transactions with cross-defendants, cross-complainants were unaware of the concealed and suppressed facts. Had cross-complainants known of Olster's fraudulent criminal past, they would not have entered into any business transactions with Olster and the other cross-defendants, and would not have reposed trust and confidence in Olster as their exclusive broker in obtaining critical financing for their projects. Likewise, had cross-complainants known that Olster and Apollo Mortgage were unlicensed, they would not have relied upon Olster or Apollo Mortgage to act as their mortgage brokers in obtaining financing for the projects, or in providing personal guarantees for those loans.

57. Cross-complainants suffered damages as a direct proximate result of the misrepresentations and concealment, including but not limited to, (a) payment of unearned broker's commissions of approximately \$1,000,000.00; (b) payment of additional points to cross-defendants in return for the assurance that the Jet Group would honor the buy-back feature; (c) payments to the Jet Group for its commitment to buy back the properties at appraised value; (d) damages caused by cross-defendants' refusal to fund loan draws in accordance with the loan agreements; (e) damages caused by cross-defendants' failure or refusal to extend loans; (f) and other related payments and liabilities.

SECOND CAUSE OF ACTION

(Breach Of Fiduciary Duty)

58. Cross-complainants incorporate by reference the allegations contained in paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again in this paragraph.

59. As cross-complainants' brokers, Olster and Apollo Mortgage owed cross-complainants a fiduciary duty, and were obligated to represent cross-complainants' interests fairly, diligently and in strict accordance with all applicable state and federal banking statutes and regulations.

60. In misrepresenting the terms under which loans were made and falsely stating

1 that The Jet Group would buy-back the subject projects upon request, Olster and Apollo
 2 Mortgage violated their fiduciary duties to cross-complainants. In addition, by favoring the
 3 interests of the lenders over those of cross-complainants, Olster and Apollo Mortgage
 4 further violated their fiduciary duties.

5 61. In addition to the over forty (40) loans that Olster and Apollo Mortgage
 6 brokered for cross-complainants, cross-defendants negotiated and promised dozens of other
 7 loans which were withheld in an effort to coerce and pressure cross-complainants into
 8 making additional concessions to cross-defendants.

9 62. Cross-complainants suffered damages as a direct proximate result of cross-
 10 defendants' breach of fiduciary duty, including but not limited to, (a) payment of unearned
 11 broker's commissions of approximately \$1,000,000.00; (b) payment of additional points to
 12 cross-defendants in return for the assurance that the Jet Group would honor the buy-back
 13 feature; (c) payments to the Jet Group for its commitment to buy back the properties at
 14 appraised value; (d) damages caused by cross-defendants' refusal to fund loan draws in
 15 accordance with the loan agreements; (e) damages caused by cross-defendants' failure or
 16 refusal to extend loans; (f) and other related payments and liabilities.

17 THIRD CAUSE OF ACTION

18 (Breach Of Contracts)

19 63. Cross-complainants incorporate by reference the allegations contained in
 20 paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again
 21 in this paragraph.

22 64. Since on or about January 1, 1999 and continuously through the present, cross-
 23 defendants have breached the loan commitments to cross-complainants by failing to fund
 24 development of cross-complainants' existing projects, and by refusing to fund additional
 25 promised loans for other planned projects.

26 65. Cross-defendants further violated the covenant of good faith and fair dealing
 27 implied by law in every agreement by acting or declining to act in such a way as to deprive

1 cross-complainants of the benefit of their bargains.

2 66. Cross-complainants have performed all obligations to cross-defendants except
3 those obligations cross-complainants were prevented or excused from performing.

4 67. Cross-complainants suffered damages caused by cross-defendants' breach of
5 contracts in the following respects: (a) compensatory damages in an amount to be proven
6 at trial, together with interest thereon at the legal rate from date of breach until date of
7 recovery; (b) loss of profit on resale of properties; (c) and for costs of suit including
8 attorneys' fees.

9 FOURTH CAUSE OF ACTION

10 (Accounting)

11 68. Cross-complainants incorporate by reference the allegations contained in
12 paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again
13 in this paragraph.

14 69. As a result of cross-defendants' actions, cross-defendants have been unjustly
15 enriched at cross-complainants' expense. The precise amount of the benefit retained by
16 cross-defendants as a result of their wrongful conduct is sufficiently uncertain as to require
17 an accounting in order to ascertain the exact damages due to cross-complainants.

18 FIFTH CAUSE OF ACTION

19 (Refund Of Unearned Commissions)

20 70. Cross-complainants incorporate by reference the allegations contained in
21 paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again
22 in this paragraph.

23 71. Olster and Apollo Mortgage acted as mortgage brokers in Arizona by
24 negotiating and obtaining the above loans on behalf of the cross-complainant entities as
25 borrowers, and Alev and BAM as guarantors. Virtually all borrowers, and both guarantors
26 are residents of, or are incorporated in, Arizona. Olster and Apollo Mortgage were
27 required to possess valid Arizona mortgage broker's licenses to conduct brokerage activities

1 in that state, and were not permitted to receive broker's commissions arising out of such
2 brokerage activities within Arizona without holding a valid Arizona broker's license.

3 72. Cross-complainants paid to Olster and Apollo Mortgage broker commissions in
4 excess of \$1,000,000.00 arising out of the unlicensed brokerage activities in Arizona.

5 73. Olster and Apollo Mortgage are obligated to refund the unearned, illegally
6 obtained commissions.

7 SIXTH CAUSE OF ACTION

8 (Usury)

9 74. Cross-complainants incorporate by reference the allegations contained in
10 paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again
11 in this paragraph.

12 75. Within the applicable limitation period(s), cross-complainants, pursuant to their
13 contracts with cross-defendants, have paid monies to cross-defendants, including
14 accumulated points and loan origination fees, in order to secure funding for cross-
15 complainants' projects. Cross-complainants further allege that InSouth and Southern
16 Financial purchased, took over and otherwise acquired such contracts from certain of the
17 cross-defendants.

18 76. The payment terms of the contracts are usurious and violate the usury laws of
19 California, Arizona and Tennessee, as well as federal law, which each prescribe limitations
20 on the lawful interest rate, and charges, fees and commissions, that may be imposed under
21 such contracts.

22 77. The payments made by cross-complainants were in excess of the maximum rate
23 of interest allowed by the usury laws of California, Arizona and Tennessee, as well as
24 federal law, and cross-complainants are entitled to recover double and treble the amount of
25 those payments.

26 ///

27 ///

28 P:0146724.01:07495.002

SEVENTH CAUSE OF ACTION

(Violation Of Business

And Professions Code Section 17200 Et Seq.)

78. Cross-complainants incorporate by reference the allegations contained in paragraphs 1 through 40 above, as fully and to the same extent as if set forth at length again in this paragraph.

79. By virtue of cross-defendants' acts as alleged above, cross-defendants are engaged in unlawful and unfair trade practices. Cross-complainants, on their own behalf as well as on behalf of the general public, seek recovery from cross-defendants for violations of California Business & Professions Code section 17200 et seq.

80. By reason of the foregoing, cross-defendants have been improperly and unjustly enriched at the expense of cross-complainants and the public in an amount as yet unascertained, in a sum to be proven at the time of trial so that cross-defendants can make appropriate restitution.

81. Cross-complainants and the public are being irreparably harmed by cross-defendants' unfair trade practices and unfair competition. There is no adequate remedy at law, thereby justifying injunctive relief.

82. Cross-complainants further request an award of all attorney's fees and costs associated with the bringing of this action under California Business & Professions Code section 17200 et seq.

WHEREFORE, Cross-complainants pray for judgment against Cross-defendants as follows:

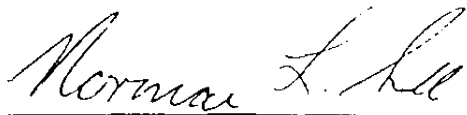
1. Damages in an amount to be proven at trial.
2. A mandatory injunction directing cross-defendants to resume funding the subject loans.
3. An injunction staying all efforts by cross-defendants to foreclose on the subject California properties pending trial in this matter.

4. Punitive damages in an amount to punish cross-defendants and deter other fraudulent and oppressive conduct.
5. For the assessment of double and treble damages against cross-defendants.
6. Interest according to proof.
7. For an accounting from cross-defendants of all monies and other benefits due cross-complainants.
8. For restitution of all monies gained by cross-defendants as a result of their unlawful acts.
9. For reasonable attorneys' fees.
10. For all other relief the Court finds proper.

DATED: May 9, 2000

SOLOMON WARD SEIDENWURM & SMITH, LLP

By



NORMAN L. SMITH
RICHARD E. MCCARTHY
KARL A. SANDOVAL
Attorneys for Defendants and Cross-Complainants

ASSIGNMENT OF RIGHTS AND COVENANT NOT TO EXECUTE

I. RECITALS

1. The Parties

The parties to this Assignment of Rights and Covenant not to Execute (hereinafter "Agreement") are Builders Financial Group, a Delaware Corporation, Bruce A. Olster, Madeline S. Olster, and Joseph E. Telese (collectively referred to hereinafter as "the BFG parties") on the one hand, and Benjamin A. Alev, Amnon Kawa, Draper Plaza, LLC, a Nevada limited liability company, AMKA Holdings, LLC, a Nevada limited liability company, BAM Investment, Inc., an Arizona corporation, ABA, LLC, a Nevada limited liability company, Benjamin A. Alev, Trustee of the KTB Irrevocable Trust, ALKA Enterprises, LLC, an Arizona limited liability company, Steele Canyon 2, LLC, an Arizona limited liability company, Steele Canyon 14, LLC, an Arizona limited liability company, Steele Canyon 33, LLC, an Arizona limited liability company, Dove Hollow, LLC, an Arizona limited liability company, 2903 Wishbone Way, LLC, an Arizona limited liability company and P.B.B., LLC, an Arizona limited liability company (collectively referred to hereinafter as "the Alev parties"), on the other hand.

2. The Underlying Litigation

The Alev parties are plaintiffs and the BFG parties are defendants in one case pending in the United States District Court for the Southern District of California entitled *Alev, et al. v. Apollo Funding Corp, et al.*, Case No. 99 CV 1527B (LAB) (hereinafter referred to as "the Federal Lawsuit"). The Alev parties are defendants/cross complainants and the BFG parties are cross-defendants in another case pending in the Superior Court of California, San Diego County entitled *Apollo Funding Corp. v. Alev, et al.*, Case No. GIC 732437 (hereinafter referred to as "the State Lawsuit"). The Federal Lawsuit and the State Lawsuit are referred to collectively hereinafter as "the Underlying Litigation").

3. Gulf's Bad Faith Conduct

The BFG parties tendered the defense of the Underlying Litigation to their insurer, Gulf Underwriters Insurance Company (hereinafter "Gulf") under Gulf Specialty Errors and Omissions Liability Insurance Policy number GUO406235 ("the Policy"). By letter dated October 12, 2000, Gulf agreed to defend BFG under a reservation of rights. The BFG parties contend that Gulf has refused to (a) fulfill or perform its obligation to provide a defense (b) pay or reimburse the BFG parties' attorneys' fees and costs of defense of the Underlying Litigation and (c) reasonably investigate and/or settle the Underlying Litigation.

4. The Coverage Litigation

On October 13, 2000, Gulf filed a lawsuit in the United States District Court for the Southern District of California entitled *Gulf Underwriters Insurance Company v. Builders Financial Group, et al.*, Case No. 00 CV 2054 IEG (NLS) (hereinafter referred to as "the Coverage Litigation"). The BFG parties filed a counter-claim against Gulf alleging breach of the insurance contract and bad faith. The BFG parties contend Gulf has engaged in further bad faith conduct since the counter-claim was filed.

Now therefore, for valuable consideration as set forth below, the parties agree as follows:

II. AGREEMENT

A. Assignment of Rights

The BFG parties hereby assign to the Alev parties, or their designee, to the fullest extent permitted by law, all of their rights, claims and/or causes of action they have, may have or may later acquire against Gulf, without limitation, based on Gulf's denial of defense and indemnification and the BFG parties' claim for payment or reimbursement of attorneys' fees and costs incurred in the defense of the Underlying Litigation.

B. Dismissal of the Federal Lawsuit

The Alev parties will dismiss without prejudice all claims against the BFG parties in the Federal Lawsuit.

C. Covenant not to Execute on Judgment

The Alev parties retain the right to proceed to trial in the State Lawsuit against one or more or all the BFG Parties. However, they agree to execute on any judgment they obtain in the State Lawsuit only against (a) Builders Financial Group up to the amount of \$100,000 and (b) Gulf, without any monetary limitation. The Alev parties specifically covenant and agree not to execute on or otherwise pursue satisfaction of any judgment they may obtain in the State Lawsuit, or any judgment they may obtain in any existing or future litigation relating in any way to the claims asserted or which could have been asserted in the Underlying Litigation, against any assets of the BFG parties other than as set forth in this paragraph II.C. and the Policy.

D. Effective Date

This Agreement shall become effective only upon entry of judgment in favor of the Alev parties against the BFG parties and said effect shall be immediate and automatic upon such entry of judgment.

E. Prosecution of Claims Against Gulf

Immediately after this Agreement becomes effective, the Alev parties shall have the right to arrange for counsel of their choice to substitute for the BFG parties' existing counsel in the Coverage Litigation. Such counsel will represent the Alev parties as well as the BFG parties to the extent of their remaining claims which are not assignable. However, the Alev parties will have complete control, in their absolute discretion, of the conduct of the Coverage Litigation or any other litigation or proceeding against Gulf arising from this Agreement, and will have sole discretion to determine if, when, and for what amount, any settlement will be effected. The Alev parties will be solely responsible for all attorneys' fees, costs and expenses of the Coverage Litigation incurred after the Alev parties assume control of the litigation, as well as for payment of any adverse judgments or sanctions unless such sanctions are attributable to the conduct of the BFG parties. The BFG parties agree to pay all fees including attorneys' fees and costs incurred before the Alev parties assume control of the Coverage Litigation.

F. Settlement Percentages

In the event of a settlement of the Coverage Litigation, the Alev parties will be entitled to retain the first \$600,000, and to be reimbursed for all of their attorneys' fees, costs and expenses before the BFG parties will participate in any settlement proceeds. Thereafter, the Alev parties will receive 80% of all additional settlement proceeds and the BFG parties will receive 20% of such additional proceeds.

G. Cooperation

The BFG parties and their counsel agree to cooperate as reasonably necessary in the prosecution of the Coverage Litigation, to testify in any action related to this Assignment, and further agree to execute any additional documentation reasonably required to establish or enforce the rights assigned. However, the Alev parties will pay all reasonable expenses of the BFG parties for travel, meals and hotel costs.

H. Representations and Warranties

The parties each represent they are fully authorized to enter this Agreement on their own behalf and on behalf of any entity for which they have signed. The BFG parties further warrant and represent to the Alev parties that (i) the BFG parties have

not previously assigned, transferred, purported to assign or transfer to any person, firm, corporation or entity, any rights assigned under this Agreement, or rights relating to the Underlying Litigation, the Coverage Litigation or the Policy nor has such assignment or transfer occurred as a consequence of law, or by operation of law, and (ii) the amount of attorneys' fees and costs incurred by the BFG parties since tender of defense of the Underlying Litigation exceeds \$150,000 of which no amount has been paid or reimbursed to BFG or its counsel by Gulf. The parties further represent they are represented by competent counsel, that they have made such investigation of the facts as they deem appropriate before entering into this Agreement, and that they are not relying on any statements, representations or warranties not contained herein. Other than as set forth in this Agreement, the parties make no representations, express or implied, with respect to this Agreement. Specifically, the BFG parties have not represented, and do not represent that, the Alev parties are likely to prevail, or will ultimately prevail, on any claims they may assert against Gulf.

I. Integrated Agreement

This Agreement is the entire agreement between the parties, and supersedes any prior or contemporaneous agreements, whether written or oral. This Agreement may be modified, changed or amended only by a writing fully executed by all of the parties hereto.

J. Applicable Law

This Agreement was made and entered into in San Diego, California and shall be construed under the laws of the State of California.

K. Venue and Jurisdiction

For purposes of venue and jurisdiction, this Agreement shall be deemed made and to be performed in the City of San Diego, California.

L. Counterparts

This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one document.

M. Attorneys' Fees

In the event any litigation, arbitration, mediation, or other proceeding ("Proceeding") is initiated by any party(ies) against any other party(ies) to enforce, interpret or otherwise obtain judicial or quasi-judicial relief in connection with this Agreement, the prevailing party(ies) in such Proceeding shall be entitled to recover from the unsuccessful party(ies) all costs, expenses, actual attorneys' and expert witness

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N. Ambiguities

This Agreement was drafted jointly by counsel for the parties hereto. Therefore, in the event of any ambiguity, it shall not be construed against any party as the drafter hereof.

DATED: 3-7-01

BUILDERS FINANCIAL GROUP, a
Delaware Corporation

By: 

Bruce Olster, its Vice President
(please print name & title)

DATED: 3-7-01


BRUCE A. OLSTER

DATED: _____

MADELINE S. OLSTER

DATED: _____

JOSEPH E. TELESE

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This Agreement was made and entered into in San Diego, California and shall be construed under the laws of the State of California.

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DATED: 3-7-01

BUILDERS FINANCIAL GROUP, a
Delaware Corporation

By: 

Bruce Olster, its Vice President
(please print name & title)

DATED: 3-7-01


BRUCE A. OLSTER

DATED: 3-8-01


MADELINE S. OLSTER

DATED: _____

JOSEPH E. TELESE

J. Applicable Law

This Agreement was made and entered into in San Diego, California and shall be construed under the laws of the State of California.

K. Venue and Jurisdiction

For purposes of venue and jurisdiction, this Agreement shall be deemed made and to be performed in the City of San Diego, California.

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DATED: 3-7-01

BUILDERS FINANCIAL GROUP, a
Delaware Corporation

By: 

Bruce A. Olster, its Vice President
(please print name & title)

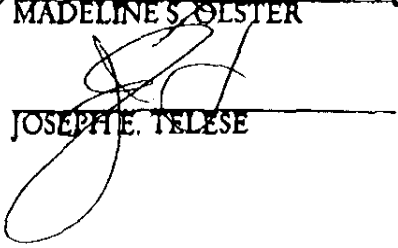
DATED: 3-7-01


BRUCE A. OLSTER

DATED: 3-8-01


MADELINE S. OLSTER

DATED: 3-8-01


JOSEPH E. TELESE

fees, relating to or arising out of (a) such Proceeding (whether or not such Proceeding proceeds to judgment), and (b) any post-judgment or post-award proceeding including without limitation one to enforce any judgment or award resulting from any such Proceeding. Any such judgment or award shall contain a specific provision for the recovery of all such subsequently incurred costs, expenses, actual attorneys' and expert witness fees.

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DATED: _____

BUILDERS FINANCIAL GROUP, a
Delaware Corporation

By: _____
_____, its
[please print name & title]

DATED: _____

BRUCE A. OLSTER

DATED: _____

MADELINE S. OLSTER

DATED: _____

JOSEPH E. TELESE

DATED: 3-12-01

BENJAMIN A. ALEV

DATED: 3-12-01

AMNON KAWA

DATED: 3-12-01

DRAPER PLAZA, LLC, a Nevada limited
liability company

By: _____
Benjamin A. Alev, its member
[please print name & title]

DATED: 3-12-01

AMKA HOLDINGS, LLC, a Nevada limited liability company

By: 

Arnon Kautz, its member.
[please print name & title]

DATED: 3-12-01

BAM INVESTMENT, INC., an Arizona Corporation

By: 

Benjamin A. Alev, its member
[please print name & title]

DATED: 3-12-01

ABA, LLC, a Nevada limited liability company

By: 

Benjamin A. Alev, its member
[please print name & title]

DATED: 3-12-01

KTB IRREVOCABLE TRUST

By: 

Benjamin A. Alev, Trustee

DATED: 3-12-01

ALKA ENTERPRISES, LLC, an Arizona limited liability company

By: 

Benjamin A. Alev, its member
[please print name & title]

DATED: 3-12-01

STEELE CANYON 2, LLC, an Arizona limited liability company

By: 

Benjamin A. Alev, its member
[please print name & title]

DATED: 3-12-01

STEELE CANYON 14, LLC, an Arizona
limited liability company

By: 

Benjamin A. Allen, its member
[please print name & title]

DATED: 3-12-01

STEELE CANYON 33, LLC, an Arizona
limited liability company

By: 

Benjamin A. Allen, its member
[please print name & title]

DATED: 3-12-01

DOVE HOLLOW, LLC, an Arizona limited
liability company

By: 

Benjamin A. Allen, its member
[please print name & title]

DATED: 3-12-01

2903 WISHBONE WAY, LLC, an Arizona
limited liability company

By: 

Benjamin A. Allen, its member
[please print name & title]

DATED: _____

P.B.B., LLC, an Arizona limited liability
company

By: _____

_____, its _____
[please print name & title]

DATED: 3-12-01STEELE CANYON 14, LLC, an Arizona
limited liability companyBy: Benjamin A. Alvir, member
[please print name & title]DATED: 3-12-01STEELE CANYON 33, LLC, an Arizona
limited liability companyBy: Benjamin A. Alvir, member
[please print name & title]DATED: 3-12-01DOVE HOLLOW, LLC, an Arizona limited
liability companyBy: Benjamin A. Alvir, member
[please print name & title]DATED: 3-12-012903 WISHBONE WAY, LLC, an Arizona
limited liability companyBy: Benjamin A. Alvir, member
[please print name & title]DATED: 3-12-01P.P.B., LLC, an Arizona limited liability
companyBy: Bernard Bortnick, its Member
[please print name & title]

FILED
STEPHEN THUNBERG
Clerk of the Superior Court

MAY 01 2001

By: D. LIM, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

APOLLO FUNDING CORP., a Delaware
corporation,

Plaintiff,

v.

BENJAMIN A. ALEV, an individual;
AMNON KAWA, an individual; DRAPER
PLAZA, LLC, a Nevada limited liability
company; AMKA HOLDINGS, LLC, a
Nevada limited liability company; BAM
INVESTMENT, INC., an Arizona
corporation; ABA, LLC, a Nevada limited
liability company; BENJAMIN A. ALEV,
TRUSTEE OF THE KTB IRREVOCABLE
TRUST, ALKA ENTERPRISES, LLC, an
Arizona limited liability company; STEELE
CANYON 2, LLC, an Arizona limited
liability company; STEELE CANYON 14,
LLC, an Arizona limited liability company;
STEELE CANYON 33, LLC, an Arizona
limited liability company; DOVE
HOLLOW, LLC, an Arizona limited liability
company; and DOES 1 through 200,
inclusive,

Defendants.

Case No.: GIC 732437

~~PROPOSED~~ JUDGMENT

I/C Judge: Hon. Charles R. Hayes
Dept.: 66

Action Filed: July 9, 1999

Trial Date: March 13, 2001

[Caption continued on next page]

Exhibit D
Page 51

1 BENJAMIN A. ALEV, an individual;
 2 DRAPER PLAZA, LLC, a Nevada limited
 3 liability company; BAM INVESTMENT,
 4 INC., an Arizona corporation; ABA, LLC, a
 5 Nevada limited liability company;
 6 BENJAMIN A. ALEV, TRUSTEE OF THE
 7 KTB IRREVOCABLE TRUST; ALKA
 8 ENTERPRISES, LLC, an Arizona limited
 9 liability company; STEELE CANYON 2,
 10 LLC, an Arizona limited liability company;
 11 STEELE CANYON 14, LLC, an Arizona
 12 limited liability company; STEELE
 13 CANYON 33, LLC, an Arizona limited
 14 liability company; DOVE HOLLOW, LLC,
 15 an Arizona limited liability company, 2903
 16 WISHBONE WAY, LLC, an Arizona limited
 17 liability company; P.P.B., LLC, an Arizona
 18 limited liability company,

19 Cross-complainants,

20 v.

21 APOLLO FUNDING CORP., a Delaware
 22 corporation, BRUCE A. OLSTER, an
 23 individual, APOLLO MORTGAGE &
 24 FINANCIAL SERVICES, INC., a Florida
 25 corporation, MADELINE OLSTER, an
 26 individual, JOSEPH E. TELESE, an
 27 individual, BUILDERS FINANCIAL
 28 GROUP INCORPORATED, a Delaware
 29 corporation, NATIONAL FUND
 30 CONTROL, LLC, a Colorado corporation,
 31 THE JET GROUP CORP., a Delaware
 32 corporation, and ROES 1 through 200,
 33 inclusive,

34 Cross-defendants.

35 This cause came on regularly for trial on March 13, 2001, in Department 66 of the
 36 above-entitled court, the Honorable Charles R. Hayes, presiding. All other parties and causes
 37 of action having been dismissed, trial went forward exclusively with respect to cross-
 38 complainants' cause of action for negligence against cross-defendants BUILDERS
 39 FINANCIAL GROUP, INC., a Delaware corporation ("BFG"), BRUCE A. OLSTER,
 40 MADELINE OLSTER, and JOSEPH E. TELESE. Cross-complainants appeared by
 41 Richard E. McCarthy and William McCurine, Jr., of Solomon Ward Seidenwurm & Smith.

1 LLP. Proof having been made to the satisfaction of the court that cross-defendants had been
 2 fully advised of the time and place fixed for trial of this action and a jury trial having been
 3 waived, the court heard the testimony and considered the evidence, both oral and
 4 documentary, and the cause was argued and submitted for decision. The court having caused
 5 to be made and filed herein its written Statement of Decision,

6 Accordingly, IT IS ORDERED, ADJUDGED, AND DECREED that judgment be
 7 entered in favor of cross-complainants for negligence against cross-defendants BUILDERS
 8 FINANCIAL GROUP, INC., BRUCE A. OLSTER, MADELINE OLSTER, and
 9 JOSEPH E. TELESE, jointly and severally, in the sum of \$20,241,012.00, with interest thereon
 10 at the rate of 10% per annum from the date of judgment until paid, together with costs and
 11 disbursements in the sum of \$ _____.

12 Dated: MAY 01 2001

CHARLES R. HAYES

Honorable Charles R. Hayes
 Judge of the Superior Court

14 Judgment entered on _____, 2001, in Volume _____ of the Judgment Book, Page ____.

15 Dated: _____

Clerk

17 By: _____
 Deputy

Apollo Funding Corp. v. Alev, et al.

San Diego County Superior Court Case No. GIC 732437

F I L E D
STEPHEN THUNEERG
Clerk of the Superior Court

MAY 01 2001

PROOF OF SERVICE BY MAIL

I, the undersigned, declare:

By: D. LIM, Deputy

I am over the age of 18 years and not a party to this action. I am employed in the county of San Diego. My business address is 401 B Street, Suite 1200, San Diego, California 92101. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service.

The document(s) entitled **[PROPOSED] JUDGMENT** will be deposited with the United States Postal Service at 401 B Street, San Diego, California, on March 26, 2001 in the ordinary course of business, by placing a copy thereof in a separate envelope for each addressee named hereafter, with postage thereon fully prepaid, sealed, and addressed as follows:

Bruce Olster
734 Pinellas Bayway
Tierra Verde, FL 33715
Tel: (727) 538-0044

Madeline Olster
734 Pinellas Bayway
Tierra Verde, FL 33715
Tel: (727) 538-0044

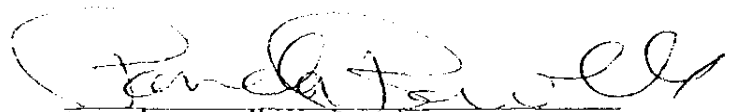
Fax:
Cross-Defendant in Pro Per

Fax:
Cross-Defendant in Pro Per

Joseph E. Telese
734 Pinellas Bayway
Tierra Verde, FL 33715
Tel: (727) 538-0044
Fax:
Cross-Defendant in Pro Per

Builders Financial Group, Incorporated
734 Pinellas Bayway
Tierra Verde, FL 33715
Tel: (727) 538-0044
Fax:
Cross-Defendant in Pro Per

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed March 26, 2001 at San Diego, California.


Pamela Powell

1 WILLIAM MCCURINE [State Bar 66773]
RICHARD E. MCCARTHY [State Bar 106050]
2 KARL A. SANDOVAL [State Bar 170190]
SOLOMON WARD SEIDENWURM & SMITH, LLP
3 401 B Street, Suite 1200
San Diego, CA 92101
4 Telephone: (619) 231-0303
Facsimile: (619) 231-4755
5
6
7

8 IN THE UNITED STATES DISTRICT COURT
9 SOUTHERN DIVISION
10

11 GULF UNDERWRITERS INSURANCE
COMPANY, a Missouri Corporation,
12

13 Plaintiff,
14

vs.
15

BUILDERS FINANCIAL GROUP, a
16 Delaware Corporation; BRUCE A. OLSTER,
an individual; MADELINE S. OLSTER, an
individual; JOSEPH E. TELESE, an individual;
and DOES 1 through 20, inclusive,
17

18 Defendants.
19

BUILDERS FINANCIAL GROUP, a
20 Delaware Corporation; BRUCE A. OLSTER,
an individual; MADELINE S. OLSTER, an
individual
21

22 Counter-Claimants,
23

vs.
24

GULF UNDERWRITERS INSURANCE
COMPANY, a Missouri Corporation,
25

26 Counter-Defendant
27
28

////

////

Case No.: 00 CV 2054 IEG (LAB)

PROOF OF SERVICE

I, the undersigned, am employed in the City of San Diego, State of California. I am over the age of 18 years and I am not a party to the within action. My business address is 401 B Street, Suite 1200, San Diego, California 92101. On May 29, 2001, I served the document(s): **STIPULATION ALLOWING COUNTER-CLAIMANTS TO FILE FIRST AMENDED COUNTER-CLAIM AND ORDER THEREON** on the party(ies) in this action as follows:

James J. S. Holmes, Esq.
SEDGWICK DETERT MORAN & ARNOLD
 801 South Figueroa Street, 18th floor
 Los Angeles, CA 90017-5556
 Tel. (213) 426-6900
 Fax (213) 426-6921
 Attorneys for Gulf Underwriters Insurance
 Company

XX (BY MAIL) I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at San Diego, California. I am readily familiar with the practice of Solomon Ward Seidenwurm & Smith, LLP, for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service, the same day as it is placed for collection. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

_____ (BY PERSONAL SERVICE) I delivered to an authorized courier or driver authorized by Central Attorney Service to receive documents to be delivered on the same date. A proof of service signed by the authorized courier will be filed forthwith.